Office-Supreme Court, U.S.
FILED
MAR 27 1967
JOHN F. DAVIS, CLERK

Nos. 462 and 463

In the Supreme Court of the United States

OCTOBER TERM, 1966

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, AND STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONERS,

v.

FEDERAL POWER COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINIONS BELOW

The opinion of the court of appeals (IV R. 373–387) is reported at 358 F. 2d 840. The opinions and orders of the Federal Power Commission (II R. 609–717, 780–805) are reported at 31 FPC 247 and 1051. The decision of the examiner (II R. 315–494) is reported at 31 FPC 305.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1966 (IV R. 389). On June 21, 1966, the Chief Justice extended the time for filing petitions for writs of certiorari to and including August 21,

1966 (IV R. 390–391). The petitions for writs of certiorari were filed on August 19, 1966, and granted on November 7, 1966 (IV R. 392, 393; 385 U.S. 927). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Power Act, 49 Stat. 838, *et seq.*, as amended, 16 U.S.C. 791a–825r, and of the Commission's regulations are set forth in Appendix A, *infra*, pp. 109–119.

QUESTIONS PRESENTED

1. Under Section 7(b) of the Federal Power Act the Commission may not issue a license for a hydroelectric project if, in its judgment, such development should be undertaken by the United States. The question presented in No. 463 is whether the Commission had a reasonable basis on which to exercise its judgment that federal development should not be recommended.

2. Section 4(f) of the Federal Power Act provides that a person interested in constructing a licensed project under the Act may, in order to obtain the technical data required to apply for a license, receive a preliminary permit affording him priority over other applicants, including public agencies that would otherwise be entitled to preference for a license under the terms of Section 7(a). The permit in this case described a proposed project which represented one of a number of mutually exclusive plans for de-

veloping the Middle Snake River. The questions presented in No. 462 are:

a. Whether the priority conferred by a preliminary permit applies only to a project which develops the waterway *exactly* as described in the permit or includes a project which develops essentially the same stretch of the waterway in the manner determined to be "best adapted" for comprehensive development within the meaning of Section 10(a) of the Act.

b. Whether a preliminary permit, which under Section 5 of the Act may be canceled only after notice and opportunity for hearing, is automatically terminated prior to its expiration date by the Commission's denial of the permittee's first application for license filed pursuant to the permit.

c. Whether a permittee's application for license, filed in accordance with the terms of the permit and the provisions of the Commission's regulations, loses its priority because the Commission calls for additional data, as contemplated by the Commission's regulations.

STATEMENT

Petitioners challenge a decision of the Court of Appeals for the District of Columbia Circuit affirming a Federal Power Commission order issued February 5, 1964. By that order, the Commission granted a license to the Pacific Northwest Power Company (Pacific Northwest) for the construction, operation, and maintenance of a major hydroelectric project on the Snake River just above its confluence with the Salmon River at a site known as High Mountain Sheep.

Background.—The Snake River flows 1073 miles from its headwaters in western Wyoming to its confluence with the Columbia River. From that point, the Columbia flows an additional 324 miles to the Pacific Ocean. Approximately 188.3 miles from its downstream terminus (*i.e.*, at "river mile" 188.3) the Snake is joined by the Salmon River (II R. 837, 838). Just upstream from its confluence with the Salmon, the Snake is joined by another smaller tributary, the Imnaha River. (See Map, IV R. 378). Like the Salmon River, the Imnaha has a substantial population of anadromous fish (II R. 849).

Since at least the Corps of Engineers' 1949 report to Congress on the Columbia River and its tributaries,[1] it has been apparent that comprehensive development of the Columbia River Basin required ultimate construction of a dam in the vicinity of the Snake's confluence with the Salmon, with the exact location depending largely on how the most power could be developed with the least impairment of the important anadromous fish resources of that area. The 1949 report recommended a dam just below the confluence of the two rivers, at a site known as Nez Perce, but indicated that (Report, Vol. 4, p. 1491):

> In the event that the Salmon River is deemed essential for propagation of anadromous fish and the river is to be maintained unobstructed by dams, a power development could be constructed at Mountain Sheep site just upstream from the mouth of the Salmon River in lieu of Nez Perce site. * * *

[1] H. Doc. No. 531, 81st Cong., 2d Sess.

In March 1954, another Corps of Engineers' report to Congress included a recommendation of the Bureau of Reclamation for approval of a plan of development consisting of two dams, one at Mountain Sheep and one at Pleasant Valley, to develop the full fall of the 55-mile section of the Snake River between the upstream Hells Canyon Dam and the Mountain Sheep site, above the confluence with both the Salmon and the Imnaha. S. Doc. No. 51, 84th Cong., 1st Sess., pp. 165, 169.

On November 9, 1954, Pacific Northwest [2] applied for a preliminary permit [3] for a project developing the same 55-mile stretch of the Snake which would have included dams at Mountain Sheep at river mile 192.6 and Pleasant Valley at river mile 213.2. As described in the application, the overall project was similar—though not identical—to that proposed in the 1954 report by the Bureau of Reclamation. The permit

[2] Pacific Northwest is a wholly owned subsidiary of four sponsoring companies, the Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, and the Washington Water Power Company (II R. 610). Each of these companies has been operating various projects under Commission licenses. See, Federal Power Commission, *Forty Sixth Annual Report* (1966), pp. 213–215.

[3] Section 4(f) of the Federal Power Act, App. A, *infra*, p. 109, authorizes the Commission to "issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof * * *." Section 5, App. A, *infra*, p. 109, provides that preliminary permits shall be issued for the sole purpose of maintaining the priority of a permittee's license application. Section 9, App. A, *infra*, p. 111, describes the data required in a license application.

was issued on April 8, 1955, to be effective for a 3-year period commencing April 1, 1955 (I R. 151).

Pursuant to the permit, Pacific Northwest assembled the necessary data and filed a license application for the two-dam Mountain Sheep-Pleasant Valley project on September 7, 1955 (II R. 835). While the Washington Public Power Supply System (Supply System), the petitioner in No. 462, was not a party to that license proceeding,[4] the National Hells Canyon Association and the Northwest Public Power Association, described by the Supply System as its predecessors in interest (II R. 718), did participate in the hearing on the application, advocating federal development of a single high dam project at the Nez Perce site just below the confluence of the Snake with the Salmon River (II R. 851). The Department of the Interior did not participate as a party, but in its report to the Commission dated January 31, 1956, stated that it had no objection to the issuance of a license under the terms and conditions imposed by the Federal Power Act, including a requirement for full coordination.

The Commission, reversing its examiner, denied the application on the ground that the two-dam project was not best adapted to a comprehensive plan of development and expressed the view that "any combination of projects which includes Nez Perce is consistently superior to any combination of projects

[4] The Supply System was created by order of the Washington Department of Conservation and Development in January, 1957 (I R. 251–254).

which does not include Nez Perce" (II R. 842). This conclusion was based on the finding that the Nez Perce plan had much greater storage for flood control and power than any plan using the Mountain Sheep and Pleasant Valley dams and was predicated on the expectation, later shown to be unjustified, that the fish passage problem at Nez Perce could be solved within a reasonable time.

While preparing its Mountain Sheep-Pleasant Valley application, Pacific Northwest had considered the possibility of a single high dam just upstream from the mouth of the Imnaha and had "made examinations and surveys, and prepared plans, specifications and estimates for such development" (I R. 212–213). But this site had been "rejected [by Pacific Northwest] due to geological conditions" (*ibid.*). Prior to the filing of its Mountain Sheep-Pleasant Valley application, Pacific Northwest did not investigate construction below the mouth of the Imnaha, because in the company's judgment "fish passage devices had not been developed which would permit licensing of major structures obstructing runs of anadromous fish" (*ibid.*). However, in 1957, while its Mountain Sheep-Pleasant Valley application was still pending before the Commission, Pacific Northwest undertook general site investigations for the present High Mountain Sheep project (I R. 7, 17–18, 89–91), which is just below the mouth of the Imnaha.

On March 31, 1958, soon after denial of its application for the two-dam project and within the period of its permit, Pacific Northwest filed its license ap-

plication for the High Mountain Sheep project, with a single high dam to develop the full fall of the Snake above river mile 189.2 up to the Hells Canyon site (II R. 611). This new proposal, unlike the rejected proposal, contemplated a plan of development providing even more storage than the Nez Perce plan (II R. 620).

On March 15, 1960, a month and a half after the Commission had scheduled a hearing on Pacific Northwest's license application to begin on March 21, 1960, the Supply System filed a license application for a project at river mile 186.2, the Nez Perce site (I R. 247). Since the two license applications were mutually exclusive, the proceedings were consolidated (I R. 258).

Extensive hearings commenced on November 4, 1960, and concluded on July 24, 1961, except for a single session on September 12, 1961 (II R. 612). During the proceedings, 77 witnesses testified, with a resultant 14,327 pages of transcript, and 633 documentary exhibits were introduced (II R. 325). These included formal comments and recommendations on the proposed projects from the Corps of Engineers with respect to flood control, navigation, and power operation (I R. 121–125); and from the Department of Agriculture with respect to recreation needs and other matters within the special competence of the Forest Service (IV R. 220–241).

The Secretary of Interior by letter of November 21, 1960, recommended against issuing any license for either High Mountain Sheep or Nez Perce on the

ground that alternate sources of power were available and that delay was desirable to permit further studies of the fish passage problems at either dam (I R. 126–135).[5] This letter recommended several conditions if a license were issued, including requirements for fully coordinated operation with the Northwest Power Pool and that the water use be subordinated to upstream diversions for irrigation. There was no suggestion that either site should be reserved for federal development.

By letter of March 15, 1961, the new Secretary of the Interior supplemented the earlier views by contending (I R. 138–140) that a crash study of the fish passage problem was being undertaken, that alternative sources of power were available, and that accordingly the hearings should be recessed or suspended during these studies. At the same time, the Secretary advised the Commission that he was withdrawing permission for Interior Department personnel to testify on the fish problem and on power resources because, in his view, no useful purposes would be served by such appearances.[6] Again there was no suggestion

[5] This letter was in response to a Commission letter of October 21, 1959, inviting a report from the Secretary on the Pacific Northwest's High Mountain Sheep license application "to the extent [he considered] desirable" (I R. 236–237). A similar request for comment was made with respect to the Supply System's Nez Perce application (I R. 256–257).

[6] After the Secretary's letter of November 21, 1960, was placed in evidence at the request of the Commission staff (I R. 14–17), the Secretary, who was not then a party, was requested to provide a witness who could be cross-examined with respect to the load and resource estimates (appended to and discussed in the

that eventual federal development seemed indicated in his view. Fifteen months later, after the close of the record and the filing of briefs with the examiner by all parties, the Secretary of the Interior, by letter of June 28, 1962, modified his earlier position by recommending ultimate federal development. The Commission, by order of July 6, 1962 (II R. 314), reopened the record to permit inclusion of the June 28, 1962 letter (I R. 309–313) setting forth the revised position of the Secretary of the Interior, and permitted the parties to file supplemental briefs thereon.

The examiner's initial decision.—On October 8, 1962, the examiner recommended that a license for the construction of the multi-purpose hydroelectric project at High Mountain Sheep be awarded to Pacific Northwest. His decision recognized, as had all the parties,[7] that to meet the standards of Section 10(a) of the Act, *infra*, p. 111, it was necessary not only to compare the specific projects for which licenses were sought, *i.e.*, projects with dams at Nez Perce or High Mountain Sheep, but also to determine whether construction and operation of a project at either site would conform to a comprehensive plan of

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Secretary's letter) on which he had based his conclusion that there was no present need for the project (I R. 18–19). By letter received January 18, 1961 (I R. 282–283; see also I R. 280–281), the prepared testimony of such a witness and accompanying exhibits were forwarded to the Commission with the advice he would be available at the convenience of the parties and the examiner. Similarly, two Interior employees had previously been made available to testify with respect to the fish passage problem in the case (I R. 21).

[7] The numerous parties are listed at R. 322–324.

waterway development, taking into consideration power benefits, flood control, navigation, irrigation, recreation, fish, wildlife, and other beneficial public uses (II R. 394–395). The examiner explained (II R. 430) that federal development should be recommended when non-federal development would not result in the optimum development of the resources.

The examiner concluded that a comprehensive plan based upon the High Mountain Sheep proposal, which provided for the eventual development of projects on both the Salmon and Snake Rivers in addition to the presently proposed High Mountain Sheep project, best met the Section 10(a) standards since it provided, *inter alia,* for greater power production than the Nez Perce plan, greater flood control benefits and, in particular, a larger degree of preservation and maintenance of existing anadromous fish runs (II R. 460).

He also concluded that Pacific Northwest had a statutory priority for its application for the High Mountain Sheep project by virtue of the preliminary permit issued on April 8, 1955 (II R. 410–418), so that the Supply System was not entitled to assert a preference under Section 7(a) of the Act, *infra,* p. 110. In addition, he found that Pacific Northwest had demonstrated a need and market for the High Mountain Sheep power output and that it was able to finance construction of the project (II R. 455–456). By contrast, he found (II R. 456) that the Supply System application was deficient, *inter alia,* in failing to establish a need or a market for the

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power from either project and in failing to show its ability to finance construction of either project.[8]

With respect to federal development, the examiner, after detailed discussion (II R. 426–439), concluded (II R. 439–440) "that construction and operation of the High Mountain Sheep Project under license by the Commission will effectuate comprehensive development in the public interest on a comparable basis with Federal development. There is no evidence in this record that Federal development will provide greater flood control, power benefits, fish passage, navigation or recreation; and there is substantial evidence to the contrary."

In reaching this conclusion, he pointed out first (II R. 432) that the Secretary of the Interior, while urging federal development, agreed that a High Mountain Sheep dam represented the optimum development. Having discussed the various public benefits of such a development (II R. 352–356, 376–393), he considered the comparative benefits of federal and non-federal development. He noted (II R. 437) that the Corps of Engineers, which has primary jurisdiction over navigation and flood control, had formally advised the Commission that "the scope of the project and purposes served as proposed by the applicant

[8] With respect to need for the power he held (II R. 456) that "WPPSS has failed to establish a need or a market for the output of either Nez Perce or High Mountain Sheep. Its participating public agencies have an assured source of power from their own facilities or from the Bonneville Power Administration until at least 1970. Moreover, the power available to these public agencies from Nez Perce or High Mountain Sheep will be more expensive than Bonneville power."

[Pacific Northwest] would be substantially the same as those which [the Corps had] proposed * * *." The examiner and the Commission both included the license conditions for implementing these purposes recommended by the Corps of Engineers.

The examiner also expressly concluded (II R. 434) "that the public interest in the coordination of the High Mountain Sheep project with other projects in the Columbia River Basin will be as fully promoted and protected by the issuance of a license with appropriate conditions as by Federal development." In this respect he pointed out that while coordination of an entire river basin under single ownership and operation is an appealing goal, it is unobtainable in the Columbia River Basin where "numerous non-Federal projects are now operating" and, where "coordination has been effected through the Northwest Power Pool and, more recently, the Coordination Agreement" (II R. 432–433). The examiner explained (II R. 433) that the Coordination Agreement then in effect went far beyond "the limited downstream coordination proposed by the Secretary" in the letter stating his position to the Commission, and that the effectiveness of coordination under that agreement had been attested to by Mr. Charles F. Luce (then the Bonneville Power Administrator and now Under Secretary of the Interior) who had explained to Congress (*ibid.*):

> * * * What we do under this agreement is operate these facilities [federal and non-federal] in unison, you might say, or in a coordi-

nated way, to get the maximum production of power from them.

With respect to the Secretary's claim that a federal project would provide for effective fish passage "with greater flexibility and ease than a Commission licensee" the examiner found that both license applicants had agreed to install any needed fishways and had submitted detailed plans proposing large expenditures, that the Commission would require needed fishways and future modifications to the extent required, and that the assertion that federal development would assure superior fish passage was challenged by responsible State agencies (II R. 435–436).

Finally, the examiner concluded that in any realistic comparison of federal with non-federal construction the factor of delay had to be evaluated and that lack of any present interest in construction by the Department of Interior and the united opposition to federal development by local interests in the Pacific Northwest, both public and private, demonstrated that authorization of federal development in the foreseeable future was very unlikely.

The examiner thus concluded (II R. 320):

> The public benefits, and comprehensive development which will be achieved by the construction of the High Mountain Sheep project can be effectuated now, with the issuance of a license for non-Federal development. If Federal development is recommended, as requested by the Secretary of the Interior, it will probably result in the postponement of any development of this site for an indefinite period of time.

The Commission's opinion.—On December 3, 1962, the Secretary of the Interior petitioned to intervene out of time (II R. 494, 515) and for an extension of time in which to file exceptions to the examiner's decision (II R. 518). These requests, which did not suggest any need or desire for a reopening of the record for further evidence, were granted (II R. 521). The Secretary thereafter filed extensive exceptions (II R. 523–605) in which he stated that, in his view, matters of record plus matters which could be officially noticed demonstrated the need for federal development (II R. 602). No request was made to reopen the record.

The Commission, after oral argument, including argument on behalf of both petitioners, issued its opinion granting a license for a High Mountain Sheep project to Pacific Northwest, concluding without dissent that federal development should not be recommended, while dividing 3–2 on the priority issue raised by the Supply System.

The Commission opinion, which expressed substantial agreement with the examiner's decision, first determined that a plan of development including a High Mountain Sheep project would provide the most comprehensive river basin development within the meaning of Section 10(a) of the Act (II R. 613–641). The Commission then noted that "[h]aving narrowed the problem to the proposed HMS project and plan of development, we have before us PNPC's application for a license for this project, WPPSS's amendment of its Nez Perce application to include HMS,

and the request of the Secretary of the Interior not to grant any license but to recommend Federal development" (II R. 641).

As between Pacific Northwest and the Supply System, the Commission noted that the threshold problem was "whether PNPC has a priority under its preliminary permit" (II R. 641) and concluded, two Commissioners dissenting, that Pacific Northwest enjoyed such a priority and that accordingly the Supply System was not entitled to a preference under Section 7(a) of the Act (II R. 672).

With reference to the argument advanced by the Supply System that Pacific Northwest's permit was limited in geographic scope to the Mountain Sheep-Pleasant Valley project, the Commission explained (II R. 642–646):

> A preliminary permit is issued under Section 4(f) of the Act to enable an applicant for a license to make studies and gather data and at the same time under Section 5 to maintain its priority of application. * * *
>
> We consider it evident that the statutory intent of these provisions is to give a permittee the first right to develop that reach of a river to which the permit relates. * * *
>
> To interpret the priority afforded by a permit as limited to a single project would also be contrary to the two most significant objectives of the Act, namely, to encourage the development of our nation's water resources, and to insure that such development would be best adapted to the fullest use of the river, considering all uses. Who would be willing to under-

take substantial and expensive investigations looking toward development of a river if a permit were good only in the event—the unlikely event—that the results of the investigations coincided precisely with the permittee's guesstimate at the time the permit application was filed? In this connection, it is the experience of the Commission that a project is rarely constructed at the same exact site and in the same fashion as originally contemplated. Indeed, we are unaware of a single instance where this is true. * * *

If priority extended only to that project described in a permit, the pressure would be great upon the permittee not to explore fully alternative projects which might be superior. Clearly, if such investigations were conducted and an alternative development were considered preferable, the first permittee would be in danger of losing its opportunity to develop needed generating capacity as a result of its own actions. Thus, a narrow interpretation of the priority provisions would serve to undermine the objectives of Section 10(a) of the Act which is designed to insure the optimum development of our water resources. * * * [Footnote omitted.]

Pointing out that Congress intended to limit the reservations of land for power purposes though seeking to protect the most likely power sites, the Commission also explained that the requirement in the regulations for a specific geographic description of the project tentatively proposed arose from this need for limiting the land withdrawals that are auto-

matically effected under Section 24 (App. A., *infra*, p. 112) by the filing of either a permit or license application. (II R. 647, 793–795). The Commission concluded in this respect (II R. 647–648) that the reasons for restricting land withdrawals to the area specifically described in the application for a permit do not bear on the scope of a permit's priority, which is intended to encourage investigations and the needed investments required to ascertain the best adapted plan for water resource development.

In addition to finding that Pacific Northwest was entitled to a statutory priority, the Commission found that "the plans of PNPC to develop the HMS site are best adapted to conserve and utilize in the public interest the water resources of the region, and PNPC is able to carry out such plans" (II R. 672). It also found that the "differences in construction features or differences in cost as between the two applicants for the HMS project are [not] decisive * * *" (II R. 641). Moreover, it found that the Supply System, unlike Pacific Northwest, could not be licensed on the basis of the present record since it had failed to demonstrate a need for the power or an ability to finance construction of the project (II R. 655). The Commission noted that further evidence on these matters, as well as on the Supply System's legal authority to carry out its plans, would be essential if it were to be held that Pacific Northwest had no priority (II R. 655–656).

With respect to federal development, the Commission expressed full agreement with the decision of the examiner that such development should not be

recommended. The Commission rejected the Secretary's claim that Congress, by authorizing nine dams downstream from the High Mountain Sheep site, had bound the Commission to decide in favor of federal development under the terms of Section 7(b), pointing out, *inter alia;* that the Commission had "previously authorized major non-government projects on the main stem of the Columbia above the confluence with the Snake and on the Snake above the HMS site * * *" (II R. 665). With respect to flood control, navigation, recreational facilities, and the fish problem, the Commission concluded that it could "see nothing to lead us to believe that the Federal Government could do more" (II R. 667). On the issue of whether a federal High Mountain Sheep project would be better coordinated, electrically and hydraulically, with other affected projects in the river basin, the Commission stated (II R. 667–668):

> * * * We agree that the Secretary (or any single operator) normally would have a superior ability to coordinate the operations of HMS with other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter *in the context of a river system which already has a number of different project operators and an existing co-ordination system, i.e., the Northwest Power Pool.* * * * [Emphasis added.]

The Commission went on to explain that each of the four companies comprising Pacific Northwest had licensed projects in the river basin, that they were members of the Pool with good records of cooperation

and that Pacific Northwest had designed its project to be operated and coordinated with the Northwest Power Pool for the benefit of all members (II R. 668). To assure future coordination, the Commission incorporated into the license an Article requiring the licensee to operate the project in complete coordination with other power systems "in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources." (See II R. 668, 784, n. 6). The Commission added (II R. 668) that "[w]e have continuing jurisdiction and will insist that this be done. The record does not show that federal ownership is necessary to achieve this result or that proper co-ordination would not be achieved in the absence of federal development."

While concluding that "there is little if anything which would persuade us that federal development of HMS was inherently superior to licensing it to PNPC even assuming that the actual choice we had before us was between federal construction now and non-federal construction now" (II R. 668), the Commission emphasized (II R. 668–669):

> * * * these are not the true alternatives. The Department of Interior has frankly admitted it has no present intention of seeking authorization to commence construction or planning to construct an HMS project. Under these circumstances, federal construction of an HMS project is not foreseeable even assuming Congress would be willing to authorize a federal project where PNPC is willing and eager to

construct it under the terms, conditions and provisions of the Federal Power Act.

The Commission, rejecting Interior's view that the power from High Mountain Sheep would not be needed when the project would be completed, found that the "delay inherent in federal construction would foreclose power coming on the line at a time when it will be required. This disadvantage outweighs those benefits which Interior contends would result from federal construction (*i.e.,* superior co-ordination and non-power benefits discussed above), assuming *arguendo,* that such benefits would be realized" (II R. 669).

The Commission's decision on rehearing.—On rehearing, the Commission again carefully considered (II R. 780–801) the contentions of both the Secretary and the Supply System. The Secretary, in his application, continued to stress the lack of need for the power to be generated at High Mountain Sheep. For the first time he requested that opportunity be afforded him to introduce evidence on regional power resources and requirements reflecting changed circumstances (II R. 747–748). This request was repeated in a separate motion to reopen filed twenty days later on March 26, 1964 (II R. 768–772).

In addition he argued, *inter alia,* that the existence or authorization of nine downstream federal projects required, as a matter of law, a recommendation for federal development; that coordination could not effectively be achieved by conditions; and that since full coordination was not attainable by non-federal devel-

opment the record should be reopened "in order to allow the introduction of evidence regarding river operations without coordination and under varying types, modes and degrees of coordination" (II R. 737). Although the Secretary had agreed evidence on these matters was already in the record (*e.g.*, II R. 726), he did not describe what other evidence might be presented.

The Commission noted that while the Secretary had alluded to no facts to support his position, it had "nevertheless reexamined" the federal development issue and discussed at some length the reasons why it did not believe that federal development is essential in order to achieve the coordination necessary to obtain the maximum use of High Mountain Sheep for flood control, navigation and power purposes, and for believing in the efficacy of the license conditions dealing with those factors (II R. 782–786).

It specifically discussed various questions which the Secretary had raised with respect to the coordination condition imposed by the Commission. Agreeing with the Secretary as to the need for full and comprehensive coordination, it modified the license condition to make express what previously had only been implied, *i.e.*, that the licensee's coordination obligations included the duty to provide such additional transmission facilities as might prove necessary to full coordination. And the language of Article 14—the coordination condition—was also changed to make clear that the public interest required "maximiz[ing]" power production and other beneficial public uses

(II R. 786, 800). "Beyond the changes noted above" the Commission concluded (II R. 786):

> * * * we are satisfied that Article 14 requires no further modifications. We have described the general principles applicable thereto and do not consider it feasible to reduce them into concrete terms at this time.[9]

On the priority issued pressed by the Supply System, the Commission emphasized (II R. 787), "WPPSS misunderstands the significance of the preference and priority provisions of the Act. The priority provisions were not designed to counterbalance the preference rights of public bodies. * * * The priority provisions were drawn to afford protection to one who makes such investigations [under permits], irrespective of whether the party involved is a private or public agency." The Commission added

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[9] The Commission did reject the contention by Interior that it should delete that part of the coordination Article providing for such equitable sharing of the benefits of coordination by the licensee as the Commission might order. It is this facet of the coordination issue which, prior to his petition for certiorari in this Court, had been the Secretary's main source of objection. The Commission made clear in a footnote to its rehearing opinion that under no circumstances could the licensee share in the hydraulic "headwater" benefits which its project would provide to the downstream federal projects (II R. 786). See also *Idaho Power Company*, 33 FPC 976 (1965). Rather, to the extent that the licensee of the High Mountain Sheep project is otherwise required to maximize over-all power operations in the Pacific Northwest, the Commission held that a sharing of the financial benefits of such coordination would be appropriate. This issue, which the Secretary has now apparently dropped, does not relate to the question of whether the Commission properly concluded that a non-federal license would provide complete electrical and hydraulic coordination.

(*ibid.*) that because of the move toward large scale generation and integration, "it is evident that the priority provisions of the Act will assume greater significance for municipal bodies as between themselves."

The court of appeals' decision.—The court below unanimously affirmed the Commission. With respect to the Supply System's contentions that Pacific Northwest was not entitled to priority under its permit, the court concluded that the Commission construction of the permit provisions was not only reasonable but was plainly authorized by the Act. The court also found without basis the Secretary of the Interior's claims that Congress had preempted the High Mountain Sheep site by approving a number of downstream federal projects, that the Federal Power Act precluded any private development that would affect existing or planned federal developments, that the Commission's action was not supported by the record, and that the Secretary should have been permitted to introduce evidence which he had neither proffered nor described.

SUMMARY OF ARGUMENT

I

The issue in No. 463 is the propriety of the Commission's judgment, under Section 7(b) of the Federal Power Act, that development of the High Mountain Sheep project by the United States was not necessary in order to secure and effectuate a comprehensive plan for waterway development. The Sec-

retary, recognizing the limits of judicial review of the Commission's exercise of its judgment (see *Chapman* v. *Federal Power Commission,* 345 U.S. 153), frames his argument in terms of an alleged failure of record support for the Commission's action. This contention is based upon a misconception of the relationship between Section 7(b) of the Act and Section 10(a), which directs the Commission to issue a license to a non-federal applicant only where, in the judgment of the Commission, the project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes." It is clear that the record needed to establish that an application for non-federal development will be best adapted to achieve comprehensive waterway development will constitute an appropriate basis for the Commission's complementary determination under Section 7(b).

Contrary to the Secretary's contention here, the record before the Commission fully canvasses all of the various areas of comprehensive river development relevant to the Commission's exercise of its judgment in this proceeding, particularly power coordination, navigation and flood control, protection of fishery resources, recreation, and the present need for power. The record fully supports the Commission conclusion that Pacific Northwest, operating pur-

suant to the license and the Commission's continuing regulatory authority thereunder, would achieve the public purposes of water resource development, both power and nonpower, at least as well as federal development. And the Commission was also correct in concluding that there was a current need for the proposed High Mountain Sheep development, as the Secretary now admits, and that the Secretary's unwillingness to proceed with federal development constituted an additional reason for granting the license.

The Secretary's basic position is not an evidentiary one at all. Instead, he begins by erecting a presumption that every major multi-purpose hydroelectric project should be reserved for federal development, regardless of the plans of the licensee or the conditions of the Commission's license. He does not specify the areas of factual exploration in the further hearing requested but, instead, would apparently place the burden upon the licensee and the Commission to demonstrate the invalidity of his assumptions. While the Secretary's substantive position is one which reasonable men might take as a matter of policy, it is inconsistent with the legislative policy incorporated in the Federal Power Act. This is necessarily premised upon the Congressional conclusion that non-federal entities, operating under the continuing regulatory authority of the Federal Power Commission, can be relied upon to foster the comprehensive development of the nation's waterways for the public good.

II

A. No. 462 involves the scope of the priority under preliminary permits. The authors of the Federal Power Act recognized that preliminary investigations of the development of the nation's water resources can involve substantial expense. Accordingly, the Act was drafted to provide a degree of protection to persons who risk their capital and incur such expense. To this end the Commission may issue preliminary permits which, though not guaranteeing the issuance of a license to a permittee, afford protection against competing applicants who would otherwise be entitled to preference in the award of a license under Section 7(a) of the Act. Specifically, the priority afforded by a permit serves to insure that in any contest where the overall plans and capabilities of several competing applicants are essentially equivalent, the permittee, whether a private or public entity, will prevail.

Section 10(a) of the Act forbids the issuance of any license unless "the project adopted" is "best adapted to a comprehensive plan for improving or developing a waterway" for power and nonpower purposes. It follows that a project tentatively described in an application for a preliminary permit may undergo substantial modification prior to being licensed. The Commission's experience shows that there are invariably deviations between the plans submitted with the application for a permit and the plans which, in the Commission's final judgment, are best adapted to a comprehensive

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plan of development. A permit would therefore have little value if, as the Supply System contends, its priority afforded protection only if the plan adopted was identical to the one described on the permit application. A permittee's priority, to have any real meaning, must cover the project as modified to conform to the Commission's final determination of what project in the stretch of the river involved best comports with the standards of Section 10(a). Giving such effect to the permit in this case was also consistent with the notice provisions of the Power Act and the Commission's regulations.

B. Section 5 of the Act provides that permits may be issued for any period up to three years and that they may be cancelled prior to expiration only after notice and opportunity for hearing. Thus, a permit is not automatically cancelled when, prior to its expiration date, the Commission denies a license application filed by the permittee. It remains in effect, unless cancelled, for any new proposal reasonably encompassed within its terms.

C. In order to maintain his priority, a permittee must file a license application prior to expiration of the permit. This requirement is satisfied when, as here, the application is timely filed in compliance with the applicable regulations of the Commission. The fact that here, as in many situations, the Commission thereafter secured from the applicant additional data, which the regulation expressly provides need not be included in the original filing, in no way detracts from the timeliness and effectiveness of that filing.

ARGUMENT

I. THE COMMISSION'S JUDGMENT NOT TO RECOMMEND FEDERAL DEVELOPMENT OF HIGH MOUNTAIN SHEEP PROJECT WAS SOUNDLY BASED

INTRODUCTION

Under Section 10(a) of the Federal Power Act, the Federal Power Commission may issue licenses for hydroelectric projects when the projects "in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes." The section also provides that to achieve this objective the Commission may order the modification of the plans for any proposed project prior to any license grant. However, Congress, while intending to encourage water-power development in the public interest by non-federal parties (see *Federal Power Commission* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251), recognized that there would be situations in which private or other non-federal parties cannot or will not build and operate the projects that will result in comprehensive river development. Accordingly, by Section 7(b) of the Act, it provided that "[w]henever, in the judgment of the Commission the development of any water resources for public purposes should be undertaken by the United States itself", the Commission should not approve any application

but should instead recommend federal construction to the Congress.[10]

In the present case the Commission after comprehensive hearing proceedings, determined that Pacific Northwest, a respondent here, could and would construct and operate a project on the Snake River which would fully meet the statutory standards of Section 10(a) for comprehensive development and that there was therefore no reason for concluding under Section 7(b) that federal development was necessary to achieve this objective. The Secretary of the Interior, recognizing that "primary responsibility for the enforcement of the provisions of § 7(b) must remain with the Commission" (*Chapman* v. *Federal Power Commission,* 345 U.S. 153, 173), does not in terms attack this determination. Rather his claim is that the

[10] A Commission recommendation for federal development is neither a prerequisite thereto nor the usual path through which federal projects have been authorized by Congress. On the contrary, where the Secretary of the Interior or the Secretary of the Army decides that a particular project should be constructed by the United States, the recommendation of the Secretary, after approval by the Bureau of the Budget and the Executive Office of the President, is submitted directly to Congress without seeking a Federal Power Commission recommendation under Section 7(b). Where the executive branch of the government actively seeks congressional authority for a federal agency to construct a project, the Commission's practice has been to wait a reasonable time for congressional action before proceeding to act on any conflicting license application, though on occasion it has proceeded with its licensing when, after a substantial period of time, it appeared that the Congress had no present intention of authorizing federal construction. See, *e.g.*, *Fresno Irrigation District*, 8 FPC 348 and 10 FPC 460, 463. Once a project is authorized for federal construction the Commission may not

case must be remanded to the Commission for further hearing on the Section 7(b) question because the testimony and evidence at the Commission hearing allegedly was not directed to the question of whether federal development of the High Mountain Sheep site would be superior to the approved plan.

As we shall explain below, the alleged evidentiary gap stems from the Secretary's failure to recognize the essential identity between the evidence necessary to demonstrate that an applicant's proposed plan of river development will result in comprehensive development and that which is relevant to any exercise of the Commission's judgment as to whether federal construction and operation are essential to such comprehensive development. Specifically, we shall show that the evidentiary record, plus the matters of which the Commission could and did take official notice, were fully adequate to permit an informed

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grant a competing application, even if construction is indefinitely deferred, unless it is expressly deauthorized. See, for example, *Savannah River Electric Co.*, 6 FPC 317, affirmed, 164 F. 2d 408, 411 (C.A. 4).

Nor must a federal agency that does not wish to seek present authorization for a federal project, but believes it may wish to construct a project at some future time, run the risk that the Commission, in a licensing proceeding involving that project, will reach a different judgment as to the necessity for federal development. To the contrary, in such circumstances, Congress has at times been persuaded to remove all authority from the Commission to license any project in a definite area to afford Congress a full opportunity to determine whether to authorize federal development. See Act of May 29, 1928, 45 Stat. 1012 (Potomac River basin); see also Boulder Canyon Project Act of 1928, 45 Stat. 1057, 1062 (Colorado River and its tributaries).

Commission judgment. The Secretary, himself, did not suggest the need for further hearing prior to the Commission decision. Moreover, in his motion to reopen, and in his briefs in the court below and in this Court, the Secretary has never identified any significant new area for factual exploration in any new hearing. The one area in which he previously indicated the nature of the evidence that would be introduced if the record was reopened related to the issue of the need for the power. While this question was the principal focus of the Secretary's argument when the case was before the Commission, he now admits that on this issue, upon which copious evidence was taken, the Commission was right (Sec'y Br. p. 29).

It is established that petitions to reopen a record, after an agency has decided upon full hearing adversely to the petitioner, are not favored. See *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503. This is particularly true where, as here, the petitioner had a stake in delay and seeks a new hearing to explore matters it previously had not suggested could not be resolved without a new hearing. We recognize, however, that in a matter as important as the present one, where the Commission has an independent statutory responsibility to insure comprehensive development and utilization of the nation's waterways, a default of the Secretary cannot absolve the Commission from the exercise of its duties. But, as we shall show, the Commission in reaching its decision not to recommend federal development here fully considered the contentions of the Secretary in the light of a hearing record which set forth in detail the

essential facts relevant to a conclusion as to what constituted comprehensive development and Pacific Northwest's ability and willingness to carry out such plans.

The Secretary's brief makes clear that his primary area of disagreement with the Commission's judgment that federal construction and operation are not a prerequisite to comprehensive development is not with the evidentiary basis for the Commission determination at all. Rather it lies in his belief that a private licensee cannot be expected to have the incentive to operate major multipurpose developments in a manner which will fully achieve the nonpower objectives of comprehensive river development, or fully to coordinate the operation of its projects with others in the river basin, particularly those belonging to the federal government, and that Commission conditioning of the license cannot be expected to cure this deficiency.

The Secretary admits that the physical structures which would be constructed by the federal government would be essentially the same as those described in Pacific Northwest's license (Sec'y Br. p. 19). He does not take issue with the evidence as to the nature of the problems relating to flood control, navigation, recreation, and protection of fish or with the Commission's imposition of conditions for dealing with these issues. He does not dispute the fact that there is substantial record evidence as to the need for and possibility of coordination between High Mountain Sheep and the other federal and non-federal projects in the Columbia River Basin, if the licensee, as well as the owners of the other projects, are to achieve max-

imum benefits. And he does not question the basis for the Commission's critical conclusion that the judgment as to whether to recommend federal development was between proposed private development to meet a demonstrated need and federal development indefinitely postponed. The entire focus of the Secretary's presentation is, instead, on what he conceives is the unlikelihood that a private licensee can be expected to do as much to achieve the over-all public welfare as the federal government.

While the Secretary's position on this question is one which reasonable men could hold, it certainly is not compelled by the structure of the Federal Power Act. The Act is predicated on the Congressional belief that non-federal licensees can achieve comprehensive river development, including the increasingly important nonpower aspects of such development, which are specifically mentioned in the Act. Our point is that the essential area of disagreement between the Secretary and the Commission does not lie in anything which is capable of evidentiary demonstration.

While the Secretary concludes his argument with the statement that he does not seek to have this Court substitute his or its judgment for that of the Commission (Sec'y Br. p. 42), we suggest this is exactly what his position leads to.[11] And, while his argument is necessarily couched in terms of a specific application

[11] Certainly, the resolution of the underlying policy question is not likely to be advanced by countertestimony by either side as to the subjective attitudes of the other.

for a major project on a river system in which federal projects play a major—but by no means exclusive—role, we do not see how acceptance of the Secretary's arguments can lead to any conclusion other than that the Commission would be required to recommend federal development (and indefinitely defer non-federal construction and operation) in every situation in which the comprehensive plan for river development involves public purposes other than power.[12] This, we urge, would seriously cripple a basic program which Congress has established for developing the nation's waterways in the interests of the public at large—a program which has been eminently successful during the half century in which it has been in operation.

A. THE COMMISSION'S CONCLUSION THAT NON-FEDERAL CONSTRUCTION OF HIGH MOUNTAIN SHEEP WILL RESULT IN OPTIMUM DEVELOPMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

As the Commission indicated, the actual Section 7(b) question presented in this case was not whether federal construction and operation of a High Mountain Sheep project would better serve the public in-

[12] It is no answer to say that the Secretary, and other federal officials will not intervene to seek a Section 7(b) recommendation for federal development, except in rare, important cases. For, if the Secretary is correct in his basic contention that private licensees cannot be expected to carry out the nonpower objectives of comprehensive river basin development as well as the federal government, the Commission would be under an obligation to make a Section 7(b) recommendation in all multipurpose situations.

terest in comprehensive development of the waterway than licensing Pacific Northwest to perform this task. The Secretary of Interior has made it clear that he had no intention of seeking early authority to construct and operate the project, which he erroneously felt would not be needed or useful from a power standpoint. We shall show in Point B that the Commission properly gave consideration to this factor in reaching its judgment not to recommend federal construction and that the belated recognition of the Secretary, in his briefs in this Court, that there is a real need for the project does not alter the validity of the Commission's decision.

While this time factor cannot be ignored in evaluating the reasonableness of the Commission's determination, we shall demonstrate in this section of the brief that the hearing record, as supplemented by matters of which the Commission could and did take official notice, fully canvassed each of the several areas relevant to a determination of the issue of private versus federal operation of the proposed project, that the license issued by the Commission provided for project operation in a manner consistent with comprehensive development, and that the Commission fully considered, and answered each of the objections to non-federal licensing raised by the Secretary. First, however, we turn to the Secretary's contention that there was no consideration given to the Section 7(b) question during the course of the long hearing in this case.

1. Determinations Under Section 7(b) and Section 10(a) Rest on the Same Evidentiary Basis

The basic factors relevant to the exercise of the Commission's judgment under Section 7(b) are, contrary to the Secretary's assertion (Br. pp. 18–19), precisely the same factors that must be evaluated in determining whether a proposed project meets the standards of Section 10(a). That section defines the basic duty of the Commission to insure that any hydroelectric project it authorizes "will be best adapted to a comprehensive plan for improving or developing a waterway * * * for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes." As this Court has said, this means that the Commission must determine "whether a private applicant would adequately develop all the benefits that should be derived from the proposed site." *Chapman* v. *Federal Power Commission,* 345 U.S. 153, 164.

Section 7(b) contains no criteria as to the circumstances in which the Commission should exercise its judgment that a project should be federally developed. Its very existence makes clear, however, that the alternative of federal development is an integral part of the Commission's assessment under Section 10(a). For Section 7(b) shows that the Commission is free to deny a license application even if the project, as proposed or as modified by the Commission, constitutes the best possible non-federal project.

We are at a loss to understand the Secretary's view (Br. p. 19) that the Commission, in making its Section 10(a) determination of what project is best adapted to a comprehensive plan of waterway development "for the use or benefit of interstate or foreign commerce" [13] is concerned only with the physical plant to be built and not its mode of operation, including its relationship to all other projects in the waterway or river basin.[14] It is obvious that the best designed plan for flood control, navigation, water power, etc., will not adequately use the water resources involved *unless the project is properly operated* and the Commission's investigations here, as in all cases, encompassed consideration of how the facilities were to be utilized as well as what facilities were to be constructed. Moreover, inasmuch as federal operation, in view of Section 7(b), is always a potential alternative, a license application to be consistent with the "best adapted" standard of Section 10(a) must of necessity be judged, *inter alia,* in relation to possible

[13] See also Section 7(a) of the Act: "* * * the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and *utilize* in the public interest the water resources of the region * * *" (emphasis supplied).

[14] The Secretary's suggestion (Br. p. 19, n. 4) that the Commission considered too restricted a portion of the waterway is misconceived. The parties, including the staff, agreed on a "common reach" for the purpose of comparing alternative plans of development for the stretch of the Middle Snake River involved here. Beyond what was termed the "common reach" it was agreed that potential future projects could be the same regardless of whether Nez Perce or High Mountain Sheep was developed. Within the "common reach" the choice between those two dams controlled the other potential projects. There-

federal operation. It is apparent, therefore, that the Commission must rely on essentially the same evidence for its Section 10(a) and 7(b) determinations and that the failure to label the evidence as pertaining to Section 7(b) does not demonstrate that the hearing ignored the relevant information necessary to the Section 7(b) evaluation.[15] This interrelationship between Sections 7(b) and 10(a) was expressly recognized by counsel for the Secretary on oral argument (I R. 49).

2. The Record Fully Supports the Commission's Determination that Pacific Northwest Would Operate Its High Mountain Sheep Project According to a Plan Best Adapted to Comprehensive Development of the Waterway

While the Secretary has confused the relationship between Sections 7(b) and 10(a) of the Federal Power Act, he is correct in asserting that the Commission can only grant a license (and reject a federal development recommendation) where it can sustain a conclusion not only that the license incorporates a

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fore, it was necessary in determining which Middle Snake project was best adapted to compare not only the two projects but the overall plans of development related to those two dams. In evaluating each plan, the Commission viewed its effect on the entire Columbia River Basin for flood control, navigation, power development, etc. (II R. 352, 354–360, 613, 619–620, 626–627, 629–630, 657–661).

[15] The Secretary, in suggesting that the criteria are completely different, says an examiner's report on a pre-hearing conference (I R. 263–277) did not mention federal development. That report, which dealt with agreements on presenting technical evidence on comparable bases, also made no mention of "comprehensive development" or Section 10(a). Indeed, the report made no effort to define the legal issues present in the case.

plan for optimum development, but also that the prospective licensee can be relied upon to construct and operate the project in accordance with the plan. It is the Secretary's contention that, while the basic plans for federal and non-federal development would be essentially the same here (Br. p. 19), a non-federal applicant—particularly if it is a private utility—cannot be relied upon to perform the nonpower tasks inherent in comprehensive development or to coordinate its power operations with those of other segments of the industry as well as the federal government. The views are stated as self-evident propositions and there is no indication that the renewed hearing he seeks would produce anything more than opinion by way of supporting testimony. Nevertheless, we recognize that if the Commission's contrary views similarly lacked factual support, a new hearing might well be warranted.

In fact, however, the Commission's determination that construction and operation of the High Mountain Sheep project by Pacific Northwest, rather than the federal government, will best conduce to optimum development is grounded in far more than mere surmise or hope. It is, instead, based on a detailed evaluation of the plans and capabilities of Pacific Northwest in each of the several areas that are pertinent to the multipurpose project envisioned by all parties for this site, supplemented by license conditions to insure that the plans will be effectuated.

We discuss in detail below the situation with respect to navigation and flood control, protection of fish, recreation, and power coordination. It should, how-

ever be made clear that the Commssion's consideration of comprehensive development is by no means limited to evaluation of these five major factors. Thus, among the fifty-two general and special Articles, or conditions, to which the license is subject (II R. 676-682 and 31 FPC at 284–290) are provisions subordinating the project to upstream water diversion for irrigation (Article 45—put in at Interior's request); for safety of the dam structure (Articles 39 and 40); for water releases for the protection of life, health, and property (Article 6[16]); for prevention of soil erosion on adjacent lands (Article 19); for protection against fire (Articles 25, 27 and 28); and generally to give appropriate agencies of the federal government free access to project lands for communications equipment, roads, railroads, telephone and power lines, etc. (Articles 30 and 31). In other licenses, where different aspects of comprehensive development are presented, special articles to take care of the situation are provided.[17]

[16] The Commission incorporated into the license (II R. 676) most of thirty-seven articles or conditions in its Standard Form L-6, "Terms and Conditions of License for Unconstructed Major Projects Affecting Navigable Waters and Lands of the United States." These were inadvertently left out of the printed record, but appear in 31 FPC Reports at pp. 284-290 and are reproduced in Appendix B, *infra*, pp. 121–134.

[17] For example, special conditions have been attached requiring a licensee to permit storage or transportation of logs and the construction, operation and maintenance of facilities for passing logs, boats, and canoes over or around dams (*Bedford Pulp & Paper Co.*, Project No. 906, Federal Power Commission, *Eighth Annual Report* 202 (1928); *Winter Electric Light & Power Co.*, 10 FPC 1530, 1533 (1951). Licensees have been required, in interest of public health, to stock shallow areas

The Secretary, in his brief, consistently disparages the ability of the Commission's conditioning authority to achieve public purposes unrelated to power generation, and thus, in themselves, unremunerative.[18] He does not deny the power of the Commission to impose such conditions. See *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. With one exception, which we take up later (see p. 53, *infra*), he does not suggest any history of operational inadequacy. Instead, starting from the assumption that only a federal agency will have any real interest in aspects of comprehensive development which are not at least self-sustaining, he contends that a license conditioning technique cannot hope to be fully effective in meeting the specific issues that will arise during the course of the license either because specific terms will be too rigid to meet all future contingencies, or, where the conditions are open-ended, because of the delay in resolving disagreements.

This contention, it is clear, is in conflict with the basic thrust of the Federal Power Act. If Congress

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with minnows and take other measures to prevent mosquitoes from breeding. *South Carolina Public Service Authority*, Project No. 199, order issued January 14, 1941 (not reported); *Columbus Electric and Power Co.*, Project No. 485, Article 19 (unreported) of license issued December 15, 1924, see Federal Power Commission *Fifth Annual Report* 185 (1925).

[18] Expenditures for non-power purposes by a licensee as part of an overall project will be included in the cost of service upon which the licensee's utility rates are based. As the Commission discussed (II R. 617–618), the annual costs of producing power at High Mountain Sheep, including depreciation and return on investment for power and non-power facilities, are more than $4 million less than the annual cost of producing power from the next cheapest alternative source.

had believed that only the federal government could be relied upon to take the steps required for comprehensive waterway development, it would never have provided for the issuance of licenses by the Federal Power Commission to private parties for comprehensive development of the nation's rivers. In part, of course, this reflected Congress' recognition that in return for the valuable privilege of utilizing the nation's power resources, licensees could be relied upon to perform the other major tasks required of comprehensive development, without cost to the federal government.

If a proposed project is of marginal economic benefit to the licensee, a question could well be raised as to the extent to which the licensee could provide for non-power objectives. No such contention has been or could be made here.[19] Nor is it a realistic assumption that a licensee would risk jeopardizing his investment in the project,[20] by a practice of delay in responding to Commission requests to implement the license conditions. In fact, during the entire half century in which Commission licensing has been in

[19] See, *supra*, n. 18, p. 42.

[20] In addition to providing for license revocation for violation of the terms of a license or for mandatory injunctions to enforce their provisions (Federal Power Act, Section 26) and criminal sanctions (Section 316), a license is subject to recapture by the United States at the end of the license term (Section 14) or condemnation prior thereto (*ibid.*). And a project may, at the expiration of the license, be licensed to a new nonfederal entity (Section 15). A history of lack of cooperation on nonpower aspects of development would obviously have to be given great weight in making such determinations.

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effect there have been almost no cases in which formal proceedings to enforce non-power license conditions have proved necessary.[21]

Power Coordination.—One would gather from a perusal of the Secretary's brief, that on the obviously important issue of the coordination of Pacific Northwest's High Mountain Sheep project with the downstream federal projects—as well as with the other federal and non-federal projects in the entire basin—there was little or no record evidence and the Commission had merely adopted a license article directing Pacific Northwest in the most general way to coordinate its project with others on the river and in the basin. We read the record to the contrary.

Contrary to the Secretary's suggestion, the problem of coordination received major attention in the hearing. It was recognized by all parties that the achievement of full coordination of either a High Mountain Sheep or Nez Perce project with other hydroelectric facilities, and especially the downstream federal projects, was an absolute prerequisite to comprehensive development. (See, *e.g.*, IV R. 18, 26–27, 33, 37, 45–50, 130, 132, 134–136, 172–174, 182–189, 194–195, 350–352).

[21] We also note that similar problems with respect to non-power purposes are presented with federal operation of projects. While power is the responsibility of the Department of the Interior, the Corps of Engineers has responsibility for flood control and navigation; recreation and fishing resources not only are handled for the federal government by different divisions of the Department of Interior, but must be coordinated (if full development is to be achieved) with the responsible agencies of the States and local governmental bodies. Other interests, private and public, federal, state and local, will have to be consulted.

The nature of the existing voluntary coordination by the Northwest Power Pool—which included both the Bonneville System and the four utility owners of Pacific Northwest—was set out by stipulation of the parties (IV R. 350–352). The stipulation expressly noted that in September, 1961, a formal one-year coordination agreement had been signed which "will increase the effectiveness of coordination of facilities among the parties * * *" (IV R. 352). It was further noted that the "agreement is intended as a pilot plan and it is anticipated that it may result in execution of a long term coordination agreement which would include all of the major owners and operators of generating facilities in this area" (*ibid.*).

In addition witnesses for Pacific Northwest expressly testified that their High Mountain Sheep proposal was predicated upon operation as an integral part of the power pool, to be operated "as if you had one entire system as the Northwest Power Pool and operated to obtain the maximum amount of power in the area as a whole" (IV R. 173; see also IV R. 18, 33, 131, 174). They stated that they were confident (even prior to the actual working out of the formal coordination agreement) that the necessary arrangements for such complete coordination could and would be worked out (IV R. 18–19, 27–38, 130–136, 172–173).

The principal witness for Supply System on coordination was originally less sanguine as to when the various existing owners of hydroelectric projects could be expected voluntarily to achieve complete integration (IV R. 49). However, on cross-examina-

tion he agreed that, in view of the rapid developments accompanying the negotiation for the Canadian-United States treaty for the use of Canadian storage,[22] the likelihood of an early agreement for full coordination was greatly enhanced (IV R. 188–189). As we have seen, by the time the case was submitted to the examiner, this optimism (which paralleled that which Pacific Northwest's witnesses had always shared) had borne fruit in the subsequent signing of the first Pacific Northwest Coordinating Agreement (IV R. 352).

Moreover, contrary to the Secretary's statement (Br. p. 34) that coordination is "typically" antagonistic to at-site power production (and that Pacific Northwest could only coordinate at its own expense), the record indicates that Pacific Northwest's witnesses testified that optimum coordination in the present case would be beneficial to it as well as the other project owners (IV R. 134–136). In fact, the testimony showed, as one goes from limited coordination between a High Mountain Sheep project and the downstream federal projects alone to full coordination of all projects in the Columbia Basin, the ben-

[22] The effectuation of this treaty, *inter alia*, depended upon the ability of the United States utility systems to purchase portions of the Canadian "entitlement" which that country could not use during the early years of operation under the treaty. This was made possible only by the full cooperation of the federal and non-federal utility systems in the Northwest, and the necessity for planning for the early disposition of the Canadian entitlement energy tremendously expedited the pending negotiations for a full coordination agreement.

efits to both the at-site generation and to the downstream federal projects materially improve.[23]

While no witness testified on the effectiveness of coordination under the initial contractual coordination agreement referred to in the stipulation, *supra,* which, by the time of the Commission opinion, had been supplemented by a ten-year agreement and soon thereafter by a long-term agreement extending to the year 2003, the record did contain the opinions of several experts that full coordination could be achieved if contractual agreements could be made (IV R. 49, 134–136, 172–173). In addition, the examiner, whose decision was formally adopted by the Commission in this respect (II R. 683), had the views of the Administrator of the Bonneville Power Administration actu-

[23] Power studies were presented based on two degrees of coordination. Both the witness for Pacific Northwest and the Supply System showed the at-site generation and downstream benefits that would result if High Mountain Sheep was operated as part of a fully integrated and coordinated system. See, *e.g.*, I R. 12–13, IV R. 30–38, 194–195. In addition, the Supply System's witness presented a second study, under what he termed "coordinated operation" which assumed contractual coordination with the Bonneville system, but not with the entire Columbia River system. This witness showed, for example, that, in the initial period of operation prior to Canadian storage, full area cordination would result in at-site generation of 776,000 average kilowatts of prime energy compared to 739,000 average kilowatts with the lesser degree of coordination (compare IV R. 359 with IV R. 361). The related downstream benefits resulting from the operation of High Mountain Sheep on a fully integrated, coordinated basis were 173,000 average kilowatts of prime energy compared to only 93,000 average kilowatts with the limited coordination with only the federal system (*ibid.*).

ally attesting to the effectiveness of the Coordination Agreement as achieving the goals of fully coordinated, integrated operation by the cooperating systems in the Pacific Northwest.

As the examiner found (II R. 433), Mr. Luce, then the Administrator and now Under Secretary of the Interior, formally told the Congress:

> The coordination agreement is an agreement which we entered into in contemplation of the treaty being ratified. However, it is an agreement that has considerable value to the Pacific Northwest and to the Nation whether or not the treaty is ratified.
>
> In brief, what the treaty requires is that *all the generating facilities in the Pacific Northwest will be operated as though they were under a single ownership.* The majority of these generating facilities are Federal, but a substantial number are non-Federal. *What we do under this agreement is operate those facilities in unison, you might say, or in a coordinated way to get the maximum production of power from them.* [Emphasis supplied.]
>
> In connection with this agreement the United States receives a payment of $1,100,000, representing the net benefits as negotiated which the non-Federal utilities receive from our Federal upstream storage. [Hearings before House Subcommittee on Public Works Appropriations for 1963, Part 3, (BPA), 87th Cong., 2d Sess., p. 668.]

Thereafter these agreements, which have been filed with the Commission as rate schedules,[24] have repeatedly been described publicly by Bonneville and its Administrator as providing for the operation of the Columbia River Basin plants owned by 15 separate parties "as though they were owned by only one owner for the most efficient production." Hearings before House Subcommittee on Public Works Appropriations for 1966, Part 2, 89th Cong., 1st Sess., p. 467.[25]

The examiner, on the basis of this evidence, concluded that (II R. 434) "the public interest in the coordination of the High Mountain Sheep project with other

[24] The current coordination agreement has been lodged with the Court by the Secretary.

[25] See also, *e.g.*, Hearings before Senate Subcommittee on Public Works Appropriations, 1964 (Bureau of Reclamation, and Department of the Interior Power Marketing Agencies), 88th Cong., 1st Sess., p. 52 (Mr. Luce: "We believe that the coordinated operations of hydro facilities in the Pacific Northwest is an outstanding example in the United States of cooperation between public and private power"); Bonneville Power Administration, 1964 Report of U.S. Columbia River Power System, p. 10. Bonneville Power Administration, 1963 Report of U.S. Columbia River Power System, p. 2 of transmittal letter; Hearings on Third Powerplant, Grand Coulee Dam before Senate Committee on Interior and Insular Affairs, 89th Cong., 1st Sess., p. 35 (Mr. Luce: "I might say that we have had a most cooperative relationship with the utilities who signed this telegram. We now have a 39-year coordination agreement with them whereby our Federal plants and their non-Federal plants are operated as if they are in a single ownership and the benefits equitably distributed among all of the some 12 or 14 owners of these dams. * * *"

projects in the Columbia River Basin will be as fully promoted and protected by the issuance of a license with appropriate conditions [to insure coordination] as by Federal development". In so concluding he noted that all of the companies participating in Pacific Northwest were parties to the Northwest Power Pool and the new coordinating agreement, that the "existing Power Pool machinery provides for coordination, hydraulically and electrically, with the storage plants of the Federal system so as to provide for maximum prime energy in the system as a whole under periods of critical water flow" (II R. 434–435). Continued and improved coordination, he felt, could be guaranteed by a license condition directing the licensee to operate the project and its system "in complete coordination with the Northwest Power Pool" II R. 434, 466). In so holding, he noted that with numerous non-federal projects operating in the Columbia River Basin (II R. 432)[26] and with numerous agencies sharing federal responsibility within the basin (II R. 433–434), the "appealing goal" of coordination of a river basin under single ownership and operation was quite impossible.

The Commission, in its decision, similarly rejected the superiority of federal High Mountain Sheep op-

[26] Exhibit 2 of the Coordination Agreement on file with the Court, indicates that as of January 17, 1961 there were 20 federal hydroelectric projects in operation or under construction and 88 non-federal projects. The nameplate rating of these federal projects *referred to above* was about 8,500,000 kilowatts compared to about 7,000,000 kilowatts for the non-federal projects.

eration to achieve optimum coordination (II R. 667–668). As had the examiner, it agreed with the Secretary that a single owner of all of the developments in a river basin could normally be expected to have a superior ability to coordinate their operations. But it pointed out that this generalization had no significance "in the context of a river system which already has a number of different project operators and an existing co-ordination system * * *" (II R. 668). It stated that each of the companies in the Pacific Northwest had projects in the river basin, that they were members of the Northwest Power Pool, and "their record of cooperation is good". Noting that Pacific Northwest's project had been designed to operate in coordination with the pool in order to benefit all members (*ibid.*), it stated it would implement this voluntary coordination by a provision to require complete coordination, and that "[w]e have continuing jurisdiction and will insist that this be done" (*ibid.*).

The Commission's views were elaborated upon on rehearing, and changes were made in the coordination article to improve its effectiveness (II R. 784–786). In response to contentions by the Secretary, similar to those he makes here, the Commission stated that its coordination condition "presupposes, as does the coordination of any endeavor, the willingness to plan cooperatively" and that the objectives of full coordination "could be frustrated by any participant, be he federal, public or private." However, the Commission indicated that it was "beyond reasonable belief that any responsible agency, whether federal, public

or private, would in the face of enlightened public opinion deliberately seek to sabotage the object of [the coordination condition] which was designed to secure for the Northwest benefits heretofore recognized but, until recently, seldom obtainable for a mixed river basin system" (II R. 784–785).

Responding to specific objections by the Secretary to the coordination condition contained in the license, the Commission agreed that the licensee should be obliged to provide the transmission facilities required to effectuate the desired coordination and added an express provision to this effect to clarify what it believed had always been implicit (II R. 786, 800). It also modified the language of the coordination article to emphasize the fact that the coordination intended was to "maximize" power production and other beneficial public uses (*ibid.*). The Commission, however, disagreed with the contention of the Secretary that the specific nature of the desired coordination should be spelled out in the license, holding (II R. 786):

> * * * We have described the general principles applicable thereto and do not consider it feasible to reduce them into concrete terms at this time. By the time HMS will be ready for operation, the factual situation and the consequent requirements may be susbtantially different from those prevailing at this time.

The Commission also disagreed with the Secretary's contention that all costs of coordination should be at the expense of the licensee which had borne the costs of construction and operation. While the Com-

mission made clear that, under consistent interpretations of Section 10(f) of the Act, the licensee would not be entitled to, or be granted, any compensation for the "headwater benefits" it will provide the downstream federal projects,[27] it concluded that optimum basin coordination over and beyond the immediate benefits to downstream federal plants, would be enhanced by an equitable sharing of benefits (*ibid.*).

The Secretary suggests (Br. pp. 27–28) that the inadequacy of the coordination condition here is demonstrated by what he contends is the unfortunate history of coordination between Idaho Power and the Bonneville Power Administration under the license issued to Idaho Power for the Brownlee project, upstream on the Snake from High Mountain Sheep.[28] We do not comment on the merits of this contention here except to note that in the 8 years since Brownlee has gone into operation, neither the Secretary nor any other member of the Northwest Power Pool has ever sought to invoke the Commission's good offices to secure improved coordination, and on the one occasion where Idaho Power sought clarification of the coordination article in its license, the matter was resolved against the company, in accordance with the

[27] See also *Idaho Power Co.*, 33 FPC 976 (1965).

[28] While the Secretary now states that this is an area which he would propose to explore in a new hearing, in his pleadings before the Commission he indicated that the Commission could take official notice of the failure of Bonneville to reach agreement with Idaho Power (II R. 735). For the reasons given in the text, evidence as to the Bonneville-Idaho Power dispute could have no real bearing on whether federal development is required here.

desires of the Department of Interior. See *Idaho Power Co.*, 33 FPC 976.

In any event, the two situations are factually inapposite. Pacific Northwest's constituent companies are members of the Northwest Power Pool and the Coordinating Agreement, and the Coordinating Agreement expressly spells out the terms and conditions upon which Pacific Northwest will become a member.[29] Idaho Power, however, is not party to the Coordinating Agreement, and efforts to resolve its difficulties with Bonneville have been rendered difficult by the inability of the two parties to agree upon whether the federal marketing system should be extended into the company's service area.

We have discussed the Commission's treatment of the coordination issue in this great detail because we think it conclusively demonstrates that the Secretary's dispute with the Commission is not an evidentiary one, but merely a matter of opinion. We reiterate that the Commission's judgment on this question of policy, upon which reasonable men have differed, and undoubtedly will continue to differ, is wholly consist-

[29] See Sections 13(h) and 26(b) at pages 47 and 53 of the Pacific Northwest Coordination Agreement lodged with this Court by the Secretary. Section 26(b) provides: "In the event that the High Mountain Sheep Project is finally licensed for non-federal construction, the licensee of the High Mountain Sheep Project, at such time as all appeals are resolved or time for appeals has expired, may become a party by subscription hereto, subject to the provision of subsection 13(h) of this agreement, and provided further that, to the extent of any inconsistency between the provisions of this agreement and the terms of the license granted for such Project, the terms of the license shall prevail."

ent with the letter and spirit of the Act, and not subject to review, at least where it is based upon such thorough consideration of the relevant fact as in the present case.

Flood Control and Navigation.—The Chief of the Army Corps of Engineers, the federal agency responsible for navigation and flood control, formally advised the Commission that the "scope of the [Pacific Northwest] project and purposes served as proposed by the applicant would be substantially the same as those which I proposed. However, certain provisions in regard to operating the project should be inserted in a license, if issued, in order to assure approximately the same degree of resource development. It is my view that the project should be operated for flood control as recommended in my proposed report as a part of the comprehensive basin development" (I R. 122–123).

The specific conditions requested by the Chief of Engineers were included in the license, including the request that the details of an operating procedure needed to carry out the flood control function of the project should be included in a working agreement between the Corps of Engineers and the licensee (I R. 125, II R. 666–667, 679–681, 782–784). As the Commission noted, these provisions provide for operation of the High Mountain Sheep project "with optimum flood control purposes at no cost to the government for the loss of any power resulting from such operation" (II R. 782). In addition these conditions, including the provisions for an operating agreement, are consistent with Pacific Northwest's unqualified

commitment to operate High Mountain Sheep for flood control as required by the Corps (II R. 783, IV R. 137, 214–215). The arrangements between the Corps and the licensee are in fact essentially the same as those which the Corps enters into with respect to navigation and flood control in the case of flood storage reservoirs operated by the Bureau of Reclamation.

Under these circumstances, the Commission's express rejection (II R. 782) of the Secretary's contention that federal development would better serve the flood control and navigation functions was clearly warranted. While the Secretary reiterates in his brief his general allegation that a federally operated project would do a better job in this area, he does not even suggest that in a new hearing he could submit anything but opinion testimony to support his contention. The fact that in the entire history of the Federal Power Commission there has never been a situation in which a licensee has failed to live up to its responsibilities in these fields, shows the lack of substance of the Secretary's argument.

Recreation.—With respect to recreation, Pacific Northwest's Chairman of the Board, consistent with a field report of the Forest Service of the Department of Agriculture,[36] outlined extensive camping, boating, and picnic facilities that the company planned for High Mountain Sheep at an estimated cost of $500,000, pointing out that detailed plans would be worked out in consultation with the Forest Service and the responsible agencies of the States of Idaho and Oregon

[36] Most of the land surrounding the proposed High Mountain Sheep reservoir is under the jurisdiction of the Forest Service.

(II R. 353, IV R. 19–21).[31] The Commission, in accordance with the recommendation of the Department of Agriculture (IV R. 220–224), provided by Article 48, as had the examiner, that the licensee, as it had pledged, should cooperate with local, State and federal agencies in the study and preparation of a specific recreation public use plan, and that such plan be filed within one year for approval by the Commission. Furthermore, in order to secure maximum recreational benefits, Article 47 provides that the water surface of the High Mountain Sheep reservoir be kept at the highest level practicable during the summer consistent with the other purposes of the project (II R. 678).

In addition, contrary to the suggestion of the Secretary that the Commission's recreation provisions do not provide for change during the license term, the Commission, in accordance with its standard licensing conditions, required by Article 17 that the licensee agree to construct and operate such additional recreational facilities as the Commission may find to be necessary and desirable throughout the term of the license (II R. 667, App. B, *infra*, p. 126).[32]

Since the issuance of a license is in no way inconsistent with federal improvement of the area for recreational purposes in addition to that required of the

[31] The Forest Service's Field Report estimated the cost of development for recreational use facilities to be at least $320,000 (IV R. 239).

[32] In addition, Article 18, *infra*, App. B., 126, requires that the public generally have access to the project lands and reservoir for recreational purposes.

licensee, there is no basis for assuming that the federal development could do more.[33] Indeed, as with flood control and navigation, substantial public benefits will be achieved by the private licensee without expenditure of public funds.

Protection of Fish Resources.—One of the most difficult problems present throughout the proceeding has been the protection of the anadromous fish resources in the area. The primary reason for choosing the High Mountain Sheep site over Nez Perce was the Commission's conclusion, in which the Secretary concurs, that protection of the fish resources of the Salmon River precluded any early development at Nez Perce. And even at High Mountain Sheep, the Commission, while stating that it would insist that any licensee "do everything possible within the limits of reasonable expense to preserve the fish runs" (II R. 638), assumed that the best efforts would be only partly successful (*ibid.*).

It might be expected under such circumstances that the Secretary in his brief here would give special attention to the express conclusion of the Commission that there was no basis for believing that the common objectives "will not be served as adequately under the license conditions as would be the case under federal development" or to the further conclusion that there was nothing to lead it to believe that the federal government could do more for the protection of the fish

[33] As indicated, much of the land within the project boundaries and adjacent thereto is owned, or subject to the jurisdiction of, either the Forest Service or the Bureau of Land Management of the Department of the Interior.

than Pacific Northwest (II R. 667). In fact, however, the Secretary did not even challenge these conclusions in his petition for rehearing before the Commission. And, while in his brief before this Court he alleges generally that no licensee can be expected to take as great a continuing interest in the problem as the federal government, he does not suggest that he has any evidentiary basis for the claim that would be presented in any new hearing.

The reason for this reticence is clear. Unlike the Supply System which has always sought to minimize the fish problem, Pacific Northwest has always given it primary consideration. Both in its original application for the two-dam project and in its present proposal for High Mountain Sheep, it has avoided seeking authorization for Nez Perce which would have given it greater immediate power gains, largely because of its concern with the fish resources on the Salmon River. And in the hearing on its present application Pacific Northwest presented detailed evidence related to improved fish ladders and other protective devices estimated to cost in the range of $15 to $20 million ((II R. 490). The licensee, in other words, cannot be pictured on this record as disinterested in fish protection or desirous of doing only the minimum necessary to get by.

Over and beyond this, the nature of the conditions relating to fish which the Commission incorporated into its license for Pacific Northwest effectively precludes any contention by the Secretary that federal development would do better. The specific instal-

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lations for fish protection are not specified in the license as issued, nor did the Commission approve the plans as originally submitted by Pacific Northwest. Instead, the license provides in Article 42 that the licensee shall submit revised "Exhibit L drawings," which will include the project structures needed for fish protection, and the "licensee shall not begin construction until the Commission approves the exhibit" (II R. 677). Article 53 of the license, in turn, directs the licensee "for the conservation, and development of fish and wildlife resources" to construct, maintain and operate (or provide therefor) such facilities as the Commission may order upon its own motion or recommendation of the Secretary of the Interior, or the fish and game Commissions of the States of Oregon and Washington (II R. 681).

Before submitting its final plans, the licensee will consult with these agencies to whom the license gives special responsibility with respect to the fish and, hopefully, will present a plan in which all interested parties can concur. Before approval of the plans, the Commission, in accordance with its normal procedure, will submit them to the federal and State fish agencies for comments and recommendations.

This, however, is not the limit of the protection afforded the Secretary in this area. Instead, by specific condition in the license (Article 16, App. B, *infra*, p. 125), it is provided that if the United States, at any time (either prior to or after construction of the project), wishes to assume responsibility for construction of fish and wildlife facilities, or improvement of existing facilities, it may utilize free of cost any of the licensees' lands, reservoirs, waterways or

project works necessary for such facilities. Additionally, after notice and opportunity for hearing, the licensee is obligated to modify the project's operation to aid the United States' operation of the fish facilities it has installed. This article, which is expressly stated not to relieve the licensee of its own obligations under the license, thus gives the Secretary the right to do the job himself, if he really believes it is necessary for comprehensive development.

Finally, Article 53 of the license expressly provides that necessary modifications of the fish facilities of the project constructed and operated by the licensee may be ordered by the Commission at any time during the license period on its own motion or on recommendation of the Secretary or the State fishery agencies (II R. 681). As already noted, the Secretary's right to make its own modifications also continues throughout the license term). There is thus no basis for any claim that the fish facilities originally incorporated will become frozen regardless of changing conditions.[34]

In short, the comprehensive license provisions for fish protection, taken together with Pacific Northwest's own record and proposals in this field, negate any view that federal construction of the project is required to achieve optimum protection of the fish resources. The fact that the State fish agencies are

[34] In addition to all of the above, the license contains a special provision inserted at the request of the State fish agencies and the Commission's staff, specifying that upon recommendation of one of the federal or State fish agencies, the licensee can be directed to coordinate its fish passage and handling facilities with those maintained by the Idaho Power Company in connection with its three developments upstream on the Snake River.

fully supporting the license grant in this proceeding, lends further support to our position. See also II R. 436.

B. THE COMMISSION'S JUDGMENT NOT TO RECOMMEND FEDERAL DEVELOPMENT REASONABLY TOOK INTO ACCOUNT THE DELAY IN FEDERAL DEVELOPMENT EVEN ASSUMING THE UNLIKELY PROSPECT OF SUCH AUTHORIZATION

Above we have discussed the Commission's reasons for believing that the proposed non-federal construction and operation of High Mountain Sheep would develop all the benefits that can be derived from development of that portion of the Snake River as adequately as federal development even if it were assumed there might be prompt federal construction. But, as the Commission stressed (II R. 668–669), the choice before the Commission was not between non-federal construction now and federal construction now, but rather between non-federal construction now and federal construction sometime in the unforeseeable future, if at all. Specifically, the Commission, as had the examiner (II R. 440–442), concluded that "the delay inherent in federal construction would foreclose power coming on the line at a time when it will be required." This disadvantage, the Commission held, "outweighs those benefits which Interior contends would result from federal construction (*i.e.*, superior co-ordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized" (II R. 669).

The Secretary attempts (Br. pp. 28–29) to brush aside this important and independent basis for the

Commission's exercise of its judgment not to recommend federal development, claiming that it was the Commission's duty, if it otherwise believed it was in the public interest to have federal development, to ignore the Secretary's disinclination to seek authority for a project and to put its case directly before the Congress. To the extent that this is a contention that the Commission's judgment must be rendered *in vacuo*, without any evaluation of the likelihood of Congressional authorization, it is directly contrary to this Court's conclusion in *Chapman* v. *Federal Power Commission*, 345 U.S. 153 at 169–170, that

> * * * [p]articularly relevant in this regard is the estimate that public development at this site would not in the normal course be undertaken for many years. * * *

See also *National Hells Canyon Association, Inc.* v. *Federal Power Commission*, 237 F. 2d 777 at 781–782 (C.A.D.C.), certiorari denied, 353 U.S. 924. This is particularly true in a case like this one, where there is no claim that the physical project to be constructed is anything other than what the federal government would construct if and when it eventually were authorized to do so. If, on the contrary, the Secretary is suggesting that there was any real likelihood that a Commission recommendation for immediate federal construction would have led to Congressional action in the light of joint opposition of the Secretary and the groups supporting private or at least non-federal development, we can only state that any such view is clearly unrealistic and certainly not one the Commission was obliged to follow.

The soundness of this Court's view that the timing of possible federal construction is relevant to the exercise of the Commission's Section 7(b) judgment is illustrated by the facts of this case. The immediate need for the power to be generated at the project is no longer disputed. Moreover, the record clearly demonstrates that the power benefits to the federal projects downstream resulting from High Mountain Sheep will be particularly significant in the early years prior to the coming into being of additional storage projects in the Columbia Basin, especially those in Canada (compare, *e.g.*, IV R. 359 with IV R. 365). High Mountain Sheep will for essentially the same reasons also be much more important for flood control in its earlier years than after the addition of other storage projects (II R. 620). Of course, if, as the Commission concluded, federal development would at best be long delayed, these very considerable flood control and power benefits would be lost forever pending subsequent federal construction.

The Secretary also asserts (Br. p. 29) that the basis for the Commission's decision in this respect is now stale because, contrary to his position before the Commission and in the court below, he now concedes there is need for the early construction of High Mountain Sheep.[35] In other words, the Secretary no longer

[35] The Secretary, inconsistently, suggests that the utility of the High Mountain Sheep project for power purposes might become of secondary importance during the license period because of the development of thermonuclear electric generation. Any such view is completely at odds with the record and with the Secretary's own actions. The fact that the expanding needs for power in the Northwest (and with increasing interconnections

challenges the Commission's conclusion that High Mountain Sheep is needed as soon as it can be put in operation, although when the case was before the Commission his major contention was that the project was not needed (see, *e.g.*, I R. 27-55 (oral argument for Secretary of Interior)). Indeed, this alleged lack of need was the principal basis upon which he sought to reopen the record (II R. 744-748, 768-772). The alleged staleness of the record lies in the Secretary's belated recognition, first acknowledged in the certiorari petition, that the Commission was correct in its

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in the entire Western part of the United States, if not the nation, as a whole) will require the addition of thermal generation, including nuclear, and that by the end of the license period the hydroelectric projects, which long supplied virtually all of the area's electricity needs, would be increasingly used for peaking purposes, was fully canvassed in the record (II R. 658, IV R. 313, 348–350, see also, *e.g.*, S. Rep. No. 314, 89th Cong., 1st Sess., p. 5). But all agreed that hydro plants using the full flow of the river system will also be needed. Indeed, the Secretary's present desire to move for early federal construction of a High Mountain Sheep project costing an estimated $200,000,000 could not be justifed absent continued power benefits for at least a 50-year period.

The continued need for hydroelectric development in the Columbia River Basin is clearly shown by the Secretary's recent actions. Only last year Congress, at Interior's request, authorized a third powerhouse at the Grand Coulee Dam with a 3.6 million kilowatt capability at a cost of $390,000,000. This expenditure was justified on the basis that power revenues would return the investment within 50 years. See H.R. Rep. No. 1409, 89th Cong., 2d Sess., pp. 4, 7. This year the Secretary has stated that the power capability of the new powerhouse (and the investment therein) will be doubled by using generators twice the size contemplated last year. Department of the Interior News Release, "Plans for Doubling Capacity Third Powerplant at Grand Coulee Announced by Udall," January 13, 1967.

conclusion. But certainly the Secretary's present agreement with the Commission's earlier conclusion that development of the High Mountain Sheep site now is required by the public interest, does not constitute a basis for setting aside this independent ground for the Commission's determination not to recommend federal development. The fallacy in the Secretary's argument lies in the fact that the validity of the Commission's decision must be determined as of the time it was made.

Moreover, even assuming that the Secretary's change of position could appropriately be considered in evaluating the validity of the Commission's decision under review, it could only partly reduce the real impact of the timing issue. For, aside from the then disinterest of the Secretary, the unanimous Commission, as well as the examiner, considered early Congressional authorization unlikely in view of the willingness of a non-federal applicant to construct the same project that might be federally developed and the unanimous opposition to federal development by the various State and local interests in the Pacific Northwest, both public and private (II R. 429–432, 440–442, 668–669). Experience indicates that in the situation where there is a non-federal applicant willing and able to construct essentially the same project, Congress is reluctant to authorize federal construction.

The history of the China Gardens project immediately downstream from High Mountain Sheep seems particularly instructive. This project had been authorized for federal construction by both the House

and Senate, but was deleted in conference after the examiner recommended private development of High Mountain Sheep and Pacific Northwest advised the Senate of its willingness to construct the China Gardens project as well. 108 Cong. Rec. 23412; Hearings before the Senate Committee on Public Works, Subcommittee on Rivers and Harbors, Flood Control—1962, 87th Cong., 2d Sess., Part 2, pp. 270, 287, 290–293.[36]

Finally, the Secretary's argument before the Commission that no High Mountain Sheep project was then useful is inconsistent with his present contention (Br. pp. 41–42) that this same project is the "key structure" in the overall development plan for power. Apparently the off-chance that coordination may not be perfect outweighs for the Secretary the need for the early enhancement of downstream power potential and needed flood control capacity. Moreover, while the High Mountain Sheep project is undoubtedly an important and major hydroelectric project, it is not,

[36] In the past Congress has demonstrated its willingness to have the Commission license non-federal development by deauthorization or suspending prior approvals for federal construction. For example, federal construction of the Priest Rapids Dam on the Columbia River, the Alabama-Coosa River development, and the Grand River Dam in the Arkansas River Basin were suspended (68 Stat. 573, 302, 450) and non-federal development licensed under the Federal Power Act. *Public Utility District No. 2 of Grant County*, 14 FPC 1067; *Alabama Power Co.*, 18 FPC 257; *Grand River Dam Authority*, 14 FPC 815. Similarly, only last November, the Congress suspended an authorization for federal development on the Tallapoosa River in Alabama, pending consideration of a possible license application under the Power Act. Public Law 89-789, p. 14, 80 Stat. 1418.

contrary to the Secretary's claim (Br. p. 42), the only remaining site suitable for a regulatory reservoir that will serve the downstream federal dams.

Thus, the federal Dworshak Dam now under construction on the North Fork of the Clearwater River will provide usable storage of 2 million acre-feet (which is comparable to that of High Mountain Sheep, II R. 620) for all of the federal downstream dams except the proposed Asotin project. See Department of the Army, Annual Report of the Chief of Engineers on Civil Works Activities, 1965, vol. 2, p. 1545. In addition, the proposed Penny Cliffs Project on the Middle Fork of the Clearwater River would also provide more than 2 million acre-feet of usable storage for the same portion of the Snake and Columbia rivers (see, H. Doc. 403, 87th Cong. 2d Sess., Vol. 1, p. 303), while a Lower Canyon Project could provide more than 3 million acre-feet of usable storage (II R. 620).[37]

[37] The Secretary also suggests (Br. p. 29) that the record is stale because the construction of a dam at Lower Canyon, which was part of the long-range High Mountain Sheep plan of development, would probably be precluded by the National Wild Rivers bill, if it is ultimately enacted. This suggestion reflects a misunderstanding of the case. The only projects proposed for Commission licensing were the Nez Perce and High Mountain Sheep projects. In order to determine whether a dam at either site would be consistent with a comprehensive plan of development it was necessary to consider possible alternatives. Specifically, it was recognized that essentially the same head could be developed by a dam at Nez Perce below the confluence of the Snake and Salmon rivers as would be developed by High Mountain Sheep on the Snake and a Lower Canyon dam on the Salmon. The principal advantage of the High Mountain Sheep plan was that it permitted postponement of a dam on the

II. THE COMMISSION WAS FULLY WARRANTED IN HOLDING THAT PACIFIC NORTHWEST WAS ENTITLED TO A STATUTORY PRIORITY FOR HIGH MOUNTAIN SHEEP

INTRODUCTION

The basic question presented in case No. 462 is whether the Commission reasonably construed the preliminary permit issued to Pacific Northwest in 1955 as affording that company a priority with respect to the High Mountain Sheep project. The Supply System's claim that the Commission's construction of the permit is inconsistent with the preference afforded public agencies by Section 7(a) of the Act ignores the purpose and role of preliminary permits in encouraging the non-federal development sought to be fostered by the Act.[38]

A. The Federal Power Act contemplates that one who seeks to develop a part of the nation's water resources for public purposes may initially invoke the

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Salmon River until the fish passage might be better solved (II R. 640). But while Lower Canyon, in conjunction with High Mountain Sheep was compared with Nez Perce to determine the relative merits of the two possible ultimate plans of development, only the project at High Mountain Sheep itself was proposed to be constructed. Its economic feasibility was determined separately (II R. 617) and is no way dependent on construction of Lower Canyon, which, if ultimately constructed, would not even necessarily be licensed to Pacific Northwest.

[38] The Supply System also completely overlooks the fact the preliminary permits, for which the public agencies have a preference (see Section 7(a), *infra*, p. 70), afford a substantial degree of protection to public agencies as well as to private power companies. Of the twenty preliminary permits now outstanding (including those for which license applications are pending), eight were issued to public agencies.

Commission's jurisdiction either by an application for a license or, if the data required for a license application is not available, by an application for a preliminary permit. In recognition of the major investments normally required to conduct the surveys and studies and to assemble the data required for a license application, the Act's draftsmen provided a degree of protection to persons who risk their capital and incur such expense. Specifically, the Act provides that the Commission may issue such persons preliminary permits which do not guarantee the issuance of a license to the permittee but protect him against competing applicants who—but for the permit—would be entitled to preference in the award of a license under Section 7(a) of the Act.[39] The priority also serves to insure that in any contest where the overall plans and capabilities of the several applicants are essentially equivalent, the permittee who made the basic studies upon which the plans are based will prevail.

[39] Section 7(a) provides: "In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

In other words, the issuance of a permit to a private power company does not foreclose the subsequent award of a license to a preference agency (or, for that matter, to any other applicant) wishing to develop the same reach of the river. The preference agency is free to file a competing license application, and, if the Commission finds (1) that the project it proposes is superior to that proposed by the permittee and (2) that the preference agency is capable of carrying out its proposal, the Commission will award the license to the preference agency.[40] But if the permittee, whether a private utility or a preference agency, makes the best proposal and is capable of carrying it out, the Commission would, absent a recommendation for federal development, award any license issued to such an applicant.

These criteria were applied in this case. The Commission found that the plans of Pacific Northwest to develop the High Mountain Sheep site are best adapted to conserve and utilize in the public interest the water resources of the region and that Pacific

[40] The order under review demonstrates that a valid permit does not automatically entitle its holder to a license. In granting the motion of the Supply System to amend its application to permit it to be considered for High Mountain Sheep (II R. 683), the Commission recognized that Pacific Northwest's priority was not dispositive in choosing between the competing applicants. If the Commission had deemed the Supply System's plans for High Mountain Sheep superior to those of Pacific Northwest and that it was legally and otherwise capable of carrying these out, it undoubtedly would have granted a license to the former agency, despite the latter's priority.

Northwest is able to carry out such plans (II R. 672). The Commission also concluded that it was not satisfied as to the Supply System's ability to carry out its plans for a High Mountain Sheep project and that on the basis of the record made it would not award a license to the Supply System (II R. 655). The Supply System has not challenged this latter conclusion. Nor is there any basis for the Supply System's assertion that Pacific Northwest's physical plans for High Mountain Sheep were markedly inferior to its plans.

This claim rests solely on the fact that on rehearing the Commission indicated that the licensee (Pacific Northwest) should provide for the installation of generators larger than those proposed in its application (II R. 796–797, 799–800). The Supply System describes this action as "expropriation" of its project (SS Br. p. 39, n. 3), noting that its license application—which was filed some two years after Pacific Northwest's—called for the installation of the larger generators. But the Supply System ignores the record showing that the units proposed by Pacific Northwest in its license application were the largest then available from the manufacturers and that Pacific Northwest stated it was prepared to install the largest feasible units available at the time of construction (I R. 22). Moreover, the Commission did not regard the difference in the technical plans of the two applicants as decisive, indicating that the precise nature of the project to be constructed at High

Mountain Sheep could not then be determined (II R. 796). In view of the rapid advances recently achieved in generator size technology,[41] it seems quite possible that plans in this respect will be further modified to assure the best adapted project.

In these circumstances, it is clear that the Supply System's position here must necessarily rest on the contention that Pacific Northwest does not possess a valid preliminary permit for High Mountain Sheep.

B. There is also no basis for the Supply System's repeated assertion that the scope of a preliminary permit must be narrowly construed in order to give meaningful effect to the preference accorded to public agencies. As the Commission observed, there is no essential conflict between the preliminary permit and public agency preference provisions of the Act. Indeed, public agencies have a mandatory preference for preliminary permits, a right which, in these days of long distance transmission and system integration,

[41] The rapidly changing technology in this area is perhaps best evidenced by the Secretary of the Interior's recent announcement that his Department intended to double (from 300,000 kw to 600,000 kw) the size of the generators authorized for installation at Grand Coulee Dam. See Department of the Interior News Release, "Plans for Doubling Capacity Third Powerplant at Grand Coulee Announced by Udall," January 13, 1967. Less than a year earlier, Congress had authorized installation of the 300,000 kw units (P.L. 89-448, 80 Stat. 200) which the Secretary had described as "the largest hydro-generators ever installed in the United States" and "a measure of the advance of [the] technology" in this area. See Hearing on S. 1761 before the Senate Committee on Interior and Insular Affairs, 89th Cong., 1st Sess., p. 22.

will no doubt assume an increasing importance as public agencies from different locations compete with each other for available sites (II R. 787).

The legislative history makes it plain that the preference provision of Section 7(a) was not intended to limit the scope of the rights of preliminary permittees. On the contrary, it compels the conclusion that the words "where no preliminary permit has been issued" were deliberately inserted to protect and define those rights.

In early drafts of bills incorporating the basic format of the present law, the public agency preference in Section 7 was not mandatory but was left solely to the Commission's discretion. *E.g.*, H.R. Rept. No. 715, 65th Cong., 2nd Sess., p. 24. There was no language restricting the exercise of this discretion to any specified class of cases. Accordingly, the bill as drafted left open the possibility of a conflict between the preference provision of Section 7 and the priority provision of Section 5. This potential conflict was of considerable concern to Mr. O. C. Merrill, who testified on behalf of the Administration with respect to its proposed bill (Hearings before the House Committee on Water Power, 65th Cong., 2nd Sess., pp. 54–55):

> Mr. McLaughlin. In regard to the preliminary permits and the rights under them there is a provision for preliminary permits to enable one who wishes to make an investigation and to determine whether or not the project that he is looking into is feasible or not, and whether he wishes to apply for a permanent

license. Are his rights properly and sufficiently protected under section 7, which gives the municipality a prior right, regardless of the fact that there may be a preliminary permit out and the permittee may have put in a lot of time and incurred a great deal of expense, still the municipality may step in and take it away from him, and besides it is entirely within the power of the commission later to prefer somebody else regardless of the expense that the temporary permittee has incurred. It has occurred to me that the rights of the temporary permittee are not properly safeguarded in that section.

Mr. MERRILL. I am a little doubtful of that myself. This was the intention of the language of the two sections, section 5 and section 7, that we would issue preliminary permits to applicants who subsequently wished licenses and that those preliminary permits would embrace the conditions under which the priority should be maintained and the license issued. That provision of section 5 is mandatory.

Mr. PARKER. That is, that the preliminary permit shall contain the conditions.

Mr. MERRILL. The preliminary permit will state the conditions under which the license will be granted, and if the permittee complies with the conditions he gets the license.

Mr. PARKER. It is an option?

Mr. MERRILL. Yes, sir. In section 7 is the preference clause for licenses which gives the discretion to the commission to prefer any municipality over a private applicant, but it was intended that the mandatory language of

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section 5 should control the permissive language of section 7 in case the preliminary permit was already in existence.

Mr. McLaughin. Certainly, where one investigates resources on his own property to determine whether it will be profitable for him to develop them he ought to be preferred over anybody, even a municipality?

Mr. Merrill. In a great many cases there is a large amount of money involved in making the preliminary investigation, such as would be covered under the preliminary provision provided here. There are surveys to be made, water measurements to be taken, and borings, which may in the aggregate run up to $[illegible]0,000 or $200,000. [42] So I am going to suggest to the committee when the question of amendment comes up that provision be made in section 7 to include preferences for preliminary permits where they have been issued so as to make it clear what was the original intention, that the preferences in section 7 should not work against the preliminary permittee under section 5 who complied with the terms of his permit.

At the conclusion of his testimony, Mr. Merrill suggested language to make clear that the public agency preference was not intended to subordinate the rights of a permittee. *Id.* at p. 116. Under his proposal, Section 7(a) would have read (*id.* at p. 890):

That in issuing preliminary permits for projects or parts thereof, or licenses where no pre-

[42] Pacific Northwest stated in its reply brief to the hearing examiner that its total expenditures under its permit and license applications were then approaching $5 million (see II R. 415).

> liminary permit has been issued, the commission in its discretion may give preference to applications by States and municipalities * * *.

The committee recommended neither this proposal nor a proposal by Congressman A. W. Barkley to make the public agency preference in Section 7(a) mandatory by substituting the word "shall" for "may". *Id.* at p. 815.[43]

So long as the preference provision in Section 7(a) remained discretionary, Mr. Merrill's proposal to clarify the relationship between the two sections was not adopted. Had the bill been enacted in that form (*i.e.*, discretionary preference), the Commission in each case could have weighed the countervailing policies favoring protection of permittees on the one hand and preference applicants on the other. It would have been free to deny preference to a public agency if it wished to honor the priority of a private applicant; conversely, it would have been free to ignore a permittee's priority by giving discretionary preference to the application of a public agency.

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[43] The Barkley proposal was discussed at some length (*id.* at pp. 812–825) by the committee members, who showed concern that, as proposed, the mandatory preference would be unfair to permit holders. For example, Mr. La Follette of Washington stated (*id.* at p. 818): "As long as it is left in the discretion of this commission to do this, then I can see where the municipality has a show and also the man who has put his money in in good faith in getting a preliminary permit and investigated as to whether or not he wants to put out money. But if you make it obligatory that after the other man has spent his money the municipality or the State could come in and take the benefit of the real work that man had done and

The bill was, however, amended on the floor of the House, to make the preference for public bodies mandatory. 56 Cong. Rec. 9804. During the brief consideration of this amendment on the House floor, 56 Cong. Rec. 9804–5, no reference was made to the obvious potential conflict between the priority provisions in Sections 4(f) and 5 and an unlimited mandatory preference for public agencies in Section 7. Nevertheless, had there been no further changes, the inference drawn by the Supply System from the legislative history—*i.e.*, that the preference provisions were intended to take precedence over the priority provisions—might be persuasive.

But a further change was made which makes that inference untenable. Language virtually identical to that proposed by Mr. Merrill (*supra*, p. 76) was added in conference to make clear that the public agency preference was not applicable against a permit holder. As the Supply System states (Br. p. 27a), the report explained that the additional language was "in the interest of clarity." H.R. Rep. No. 1147, 65th Cong.,

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take it away from him, it does not look like a square deal to the citizens of the United States."

And Mr. Barkley conceded (*id.* at p. 824): "If the law is going to be such as to entitle a city to come in and take away from a private corporation its permit, which it obtained in good faith and which it expected to carry to a conclusion, then I think they should be reimbursed for all they paid out. But you have got to guard that carefully so as not to compel a municipality to pay back money that has been spent in speculation."

3d Sess., p. 16. We submit this necessarily meant that the previous substitution of "shall" for "may" had only been intended to accord a preference for public bodies where no priority under a preliminary permit was present."

Since the Supply System, throughout its discussion of the legislative history, suggests that the Commission strikes a fatal blow against the preference of public agencies by giving meaningful effect to the scope of preliminary permits, it bears reemphasizing that the System, by its overly broad interpretation of the priority accorded by an applicable permit,[45] misapprehends the statutory scheme. As we have discussed, *supra*, pp. 69–71, there is nothing in the Act or in the Commission's decision suggesting that a permittee with a priority under Section 5 must or could be

[45] The Supply System also misconstrues (*e.g.*, Br. p. 14) the public agency preference of Section 7(a) is part of a "seamless pattern" of legislative enactments is not borne out by the statutes it cites. Indeed, as the quotation from Attorney General Brownell's opinion indicates (Br. 42), the "preference" provision in the Flood Control Act of 1944 (which is typical of the statutes cited by the Supply System) does not deal with hydroelectric licensing but rather with "the disposition of federal power," *i.e.*, the sale of power generated at federally owned projects.

[46] The Supply System also misconstrues (*e.g.*, Br. p. 14) the Commission's view of the geographic scope of the permit when it states that the permit would have afforded a priority for projects on the Salmon River such as Lower Canyon. The Commission explained (II R. 643) that the priority related only to projects that would develop substantially the same head (*i.e.*, develop the essentially same reach of the river) as the

issued a license in preference to a competing applicant whose overall plans (and ability to carry them out) are superior. This, however, is not the situation presented here.

A. PACIFIC NORTHWEST'S PRELIMINARY PERMIT APPLIES TO THE REACH OF THE RIVER AND THEREFORE CONFERS PRIORITY WITH RESPECT TO HIGH MOUNTAIN SHEEP

The Supply System contends (Br. pp. 23–37) that Pacific Northwest's permit does not cover the High Mountain Sheep site (river miles 189.2–247) but is limited to the specific sites described by Pacific Northwest in its application for the permit, namely Mountain Sheep and Pleasant Valley (river miles 192.6–247). The Commission, rejecting this argument, concluded that (II R. 643):

> * * * [t]he statutory intent of [Sections 4(f) and 5 of the Act] is to give a permittee the first

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one described in the original permit. Since Lower Canyon would only have developed the head of a different river, the permit on the Snake would have afforded no priority for such a project.

We agree, of course, that until the Commission determined whether comprehensive development required a dam at Nez Perce or a mutually exclusive one at High Mountain Sheep, other potential projects such as Lower Canyon (though they might be investigated by any interested person) would presumably not be licensed. This would not, however, be a consequence of the scope of the permit issued to Pacific Northwest here as the Supply System states (Br. pp. 45–49), but rather would result from the Commission's independent obligation to license projects only in conformity with the most comprehensive plan of development.

> right to develop that reach of a river to which the permit relates. * * * [46]

The scope of preliminary permits, in general, must be defined by their purpose. Section 4(f) authorizes the issuance of permits "for the purpose of enabling applicants for a license * * * to secure the data * * * required by section 9 * * *." Section 9 requires an applicant for a license to submit "maps, plans, [and] specifications," and Section 10(a) requires that if a license is to issue, such "maps, plans, and specifications" must be "best adapted" to a comprehensive plan of development. Section 5 adds that the sole purpose of a permit is to maintain the permittee's "priority of application * * * for such period * * * as * * * may be necessary for making examinations and surveys, [and] for preparing maps, plans, [and] specifications * * *."

The standard set by Section 10(a) for issuance of a license is not to be taken lightly. It is no easy task

[46] Although the Supply System suggests (Br. p. 35) that the word "reach" is ambiguous, its managing director, Mr. Hurd, had no apparent linguistic difficulty in expressing his view that the Nez Perce project was superior to "any alternate and lesser project in the same reach of the Snake River" (IV R. 262). The fact of the matter is that all interested parties have been well aware, at least since the Corps of Engineers' 1949 report (*supra*, p. 4), that comprehensive development required construction of a project at one of a number of mutually exclusive sites in the vicinity of the confluence of the Snake and Salmon Rivers—*i.e.*, a project located in what the Supply System's counsel termed the Nez Perce "reach" (IV R. 325).

to conceive and design a project which is "best adapted" to the several purposes enumerated in that section. And there can be no question but that the location of the project may be of crucial significance in terms of Section 10(a).[47] Thus, in order to satisfy the statutory standard, a prospective developer may well be required to study and investigate more than one possible site. Indeed, the Commission's experience shows that an applicant's first guess rarely, if ever, coincides with the ultimate determination of what is the best adapted plan (see, *infra*, p. 85).

Section 5 of the Act contemplates that a permittee shall undertake "examinations and surveys" and prepare maps to be used in connection with the license application.[48] Only if these examinations, surveys, and maps are not intended to relate to selection of the best location for the project could it be said that the priority afforded by Section 5 is limited to the specific site tentatively described in the application for that permit. Such a construction, we contend, would be most unrealistic and undesirable. As the Commission explained (II R. 645):

> If the priority extended only to that project described in a permit, the pressure would be great upon the permittee not to explore fully alternative projects which might be superior.

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[47] Indeed, a key to the Section 10(a) determination in this case was the choice of site. Similarly, the Commission's decision denying Pacific Northwest's license application for the Mountain Sheep-Pleasant Valley project turned on the choice of site (see II R. 839).

[48] A permit would not be issued if the detailed information called for in a license application were already available. See, *Georgia Power Co.*, 27 FPC 663.

> * * * Thus, a narrow interpretation of the priority provisions would serve to undermine the objectives of Section 10(a) of the Act which is designed to insure the optimum development of our water resources. * * *

It is significant that the Supply System has been no more able than was the Commission (II R. 644) to discover a single case where a project was constructed at precisely the same site and in the same fashion as originally contemplated. This, perhaps more than any other fact, demonstrates the practical soundness of the Commission's decision. Precise project sites can only be determined after thorough examinations and surveys,[49] and the sole purpose of a permit is to protect the permittee with respect to the product of such examinations and surveys. To invalidate the permit because of any change in site would, as the Commission noted (II R. 643–644), substantially nullify Sections 4(f) and 5 of the Act.

1. The Notice Requirements of Section 4(f) Are Not Violated by the Commission's Determination That Priority Extended to High Mountain Sheep

The Supply System contends (Br. pp. 28–32) that because the public notice of Pacific Northwest's application for preliminary permit described the Mountain Sheep and Pleasant Valley damsites at river mile 192.6 and 213.2, it was inadequate to forewarn

[49] In its opinion on rehearing, the Commission stated "[I]t is impossible [even] at this point to determine the precise nature of the project which will eventually be constructed at HMS. * * * [A] complete geological study carried out by a more elaborate program of borings is required before construction can be authorized at any HMS site" (II R. 796).

potentially interested parties that, if granted, a permit would also confer priority with respect to a project featuring a single high dam at river mile 189.2, even though in either case the entire stretch of the river to the upstream Hells Canyon site (at river mile 247) would be developed. This reliance upon the notice provisions is inconsistent with the purposes for which preliminary permits are issued, *i.e.*, to encourage examinations and surveys to ascertain the project best adapted to comprehensive development.[50]

The Supply System's theory seems to be that a public agency opposed to a project at river miles 189.2–247 (High Mountain Sheep) and to the issuance of a permit conferring priority for such project, need not register any opposition when a permit is sought for a mutually exclusive project at river miles 192.6–247 (Mountain Sheep-Pleasant Valley).[51] But as we

[50] In ~~the~~ a somewhat similar context, this Court has recognized that in issuing certificates of public convenience and necessity, administrative agencies are not precluded from making grants not specifically sought or described in the application or notice thereof. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572. There the Court, in approving the Board's grant of a route to an airline over the objection of a competing applicant who claimed lack of notice, recognized that the routes sought by the successful applicant did differ markedly from those awarded, but explained that the notice requirements must be construed in a manner consistent with the need for flexibility in prescribing routes in the public interest.

[51] It should be noted that changes in the project boundaries may result not only from shifting the location of the dam but also from increasing the height of the dam and thereby enlarging the area to be inundated by the reservoir. Indeed, the reservoir levels proposed in Pacific Northwest's Mountain Sheep-Pleasant Valley license application were higher than the lev-

have explained, a project is rarely—if ever—constructed at the same precise location described in the application for the preliminary permit. Variation and deviation from the preliminary plans is the rule, not the exception.[32] Moreover, there has never been any doubt that in such a case, the priority would carry over to the modified project. Indeed, permit article 3(d) (I R. 162–163), a condition regularly included

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els shown in the application for the preliminary permit (*cf.*, II R. 810 and II R. 838).

[32] For example, in *Alabama Power Company*, 13 FPC 1235, 18 FPC 265, the permit described dams at river miles 13.5, 67.5, 105.7, 148.5 and 227.0, while the license described dams at miles 12, 51, 98, 147 and 227. Similarly, *P.U.D. No. 2 of Grant County*, 13 FPC 1462, 14 FPC 1067, involved a permit for a single dam at river mile 397, while the license was for two dams, one at mile 397 and the other at mile 415. In *Pacific Power and Light Company*, 12 FPC 1294, the preliminary permit contemplated a 225 foot dam on the Lewis River in Washington, while the license issued by the Commission was for a 410 foot dam located about a mile downstream from the original site. 16 FPC 1117. Similarly, Public Utility District No. 1 of Snohomish County, Washington, received a permit for the Sultan Project, 13 FPC 1657, which, when ultimately licensed, included, *inter alia*, a second downstream dam not mentioned in the application for preliminary permit, 25 FPC 1160.

In a presently pending case, the license application for Project No. 2151 by Public Utility District No. 1 of Chelan County, Washington, a member of the Supply System, described the project as located about 3 miles downstream from the project described in the applicant's corresponding preliminary permit. 13 FPC 1102. Also pending is an application of Pacific Power and Light Company for Project No. 2217 which, according to the license application will include a reservoir considerably larger than that described in the preliminary permit. 17 FPC 259. Project No. 2191, for which a license is also sought by Pacific Power and Light Company, would, according to the license ap-

in permits,[53] states that the priority will be maintained unless the permittee refuses to adopt the modifications required by the Commission.

If the project ultimately licensed must be "best adapted" under Section 10(a) of the Act, then notice of the application for a preliminary permit for a specified project must also constitute notice of possible alterations of that project within the appropriate stretch of the river that may be required to satisfy the statutory standard. In recognition of this view Section 4.30 of the Commission's regulations, *infra,* p. 114, expressly states that existence of an outstanding permit for a given project will preclude Commission consideration, until after the permittee files his license application, of a license application by any other person "covering in whole or in part the same reach of stream or streams" covered by the permit.

The Supply System also contends (Br. p. 9) that the preference agencies in the Pacific Northwest "would have been aroused" if the company had referred specifically to High Mountain Sheep in its permit application. To the extent this statement implies that those agencies would have asserted their statutory preference to obtain a preliminary permit for either project at that time, it is at odds with the record. It

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plication, differ substantially from the project described in the preliminary permit, particularly with respect to the number of proposed dams. 15 FPC 1233.

[53] Article 3(d), found in Pacific Northwest's permit, is standard language in all permits and derives from regulations issued as early as 1921, soon after the Act became law.

is apparent, to the contrary, that the reasons now stated for not asserting a preference for the permit tentatively describing Mountain Sheep-Pleasant Valley would have applied equally to one tentatively describing High Mountain Sheep.

The record shows that the agencies that now comprise the Supply System were dedicated to the construction of Nez Perce to the exclusion of any other Middle Snake project. This position was reflected by the "informal protest" filed by the Northwest Public Power Association at the time of Pacific Northwest's permit application in 1954. The protest stated:[54]

> * * * The ultimate position of the Association is that the full operation of Section 10(a) and Section 7(b) of the Federal Power Act should insure ultimate construction of the Nez Perce Dam by an agency of the federal government. * * *

Even after the Supply System had filed its license application for Nez Perce in 1960 (two years after Pacific Northwest filed its High Mountain Sheep application), the Supply System emphatically stated that it was not interested in constructing High Mountain Sheep (IV R. 5):

> We are in here to see to it that the Nez Perce project is licensed * * *. That is our one and only motivation and objective.

[54] The informal protest, dated December 22, 1954, is not included in the printed record. The Commission referred to it in the order issuing the preliminary permit (I R. 155).

The Supply System's managing director subsequently made it clear that their primary interest had not been in developing the Middle Snake themselves but in assuring the construction of Nez Perce, explaining (I R. 21):

> * * * [H]ad [Pacific Northwest] seen fit to make a filing on the Nez Perce project in my opinion the public agencies [*i.e.*, the Supply System] wouldn't have made a filing on the Nez Perce project.

In these circumstances there can be no basis for any claim that those agencies would have asserted a preference had the notice of permit application referred specifically to High Mountain Sheep. As the Commission explained (II R. 793):

> WPPSS was never really misled or deprived of notice. To the contrary, WPPSS knew exactly what was going on but apparently had to change horses in midstream. Its early interest was directed to promoting the Nez Perce site. * * * Only after that hearing concluded did WPPSS come to realize that the preservation of the fish runs on the Salmon River would unquestionably be the determining factor in the case and preclude construction of Nez Perce. Only at that late stage did WPPSS take its pride in hand and assert a claimed preference for the HMS site, distasteful as it must have been—and still is—to its concept of what is the proper development of this reach of the river. * * *

2. The Commission's View of the Scope of a Permit is Fully Consistent with Its Regulations

a. The Supply System points (Br. pp. 32–35) to the Commission's regulation requiring that an application for a preliminary permit contain a description of a specific project and implies, incorrectly we believe, that this requirement is proof that the priority relates to the proposed project so specified and to no other. However, the specificity of description required by the regulations relates only to the "approximate" or "tentative" project boundary. Section 4.82 (Exhibits H and I) App. A, *infra,* pp. 117–118.

As the Commission observed (II R. 646–648, 793–795), specificity in the permit application is required so that land withdrawals under Section 24 of the Act can be kept to a minimum since the scope of the withdrawals depends on the description in the application. Specifically it stated (II R. 646–647):

> * * * [T]he specificity in applications for permits required by our regulations arose from the necessity of limiting unnecessary reservations of land for power purposes to the detriment of the public. The legislative history of the Water Power Act evidences a grave concern with undue reservations of public lands for such purposes. [Footnote citing legislative history omitted.] It was for this reason that our regulations were designed to provide a detailed description of the lands occupied by the project. * * *

The Supply System does not dispute the Commission's conclusion that Congress evidenced a serious concern about the possibility of undue land withdrawals and that applications involving public lands should specifically describe the lands expected to be affected by the proposed project. But it claims[54] (Br. p. 33) that the Commission's regulations are inconsistent with the purpose ascribed to them by the Commission since Section 4.82 calls for a map of the project area (Exhibit H) regardless of whether any public lands are affected by the proposed project. It is obvious, however, that such a map will be useful to the Commission in determining whether any public lands will be affected, thus not leaving that determination solely to the applicant. Moreover, Section 4(f) of the Act requires the Commission to publish notice of an application for a preliminary permit in the "county or counties in which the project or any part thereof or the lands affected thereby are situated." The map thus aids the Commission in determining where newspaper publication is required.[55]

Contrary to the Supply System's suggestion (Br. pp. 30a-33a), notice is not inadequate because the project ultimately determined to be the best adapted for comprehensive development of the waterway encompasses, as here, some lands not originally described. This would be true even if such additional lands are located in a county where newspaper notice might not have been given. It is apparent that the

[55] Today notice is also published in the Federal Register. Thus, Pacific Northwest's application for preliminary permit was published on December 22, 1954, 19 Fed. Reg. 8791.

two aspects of the notice provision of Section 4(f)—*i.e.*, written notice by the Commission to any State or municipality likely to be interested in or affected by the applicant and notice by publication in the counties in which the proposed project is situated—were intended to be complementary.

As the Supply System notes (Br. p. 31a), both of these notice provisions were added on the floor of the House in the 65th Congress following the explanation of Mr. Sinnott, their author, that they were intended to implement the public agency preference provisions of Section 7(a). While newspaper publication was restricted to counties in which lands affected by a proposed project were situated, the additional written notice was not similarly limited and requires notification to States or municipalities (which under Section 3(7) includes counties) even if they are only likely to be affected or interested. This broader language of the written notice requirement shows an awareness that the area that may be affected by a proposed project cannot reasonably be limited to the precise geographical area described in the permit application. Moreover, the legislative history of the Act shows that the notice requirements were not intended to have jurisdictional consequences and that inadequate notice would not invalidate a permit (56 Cong. Rec. 9763).

b. The Supply System's further contention (Br. pp. 35–37) that Pacific Northwest should have sought an amendment to its permit before it filed its new application for High Mountain Sheep and that its failure to do so resulted in a deprivation of notice is

but another aspect of its refusal to recognize that a permit application necessarily puts potential preference applicants on notice that a permit will afford priority even if additional lands or a slightly different site is needed to develop the best adapted project.

Its position rests on an erroneous construction of Section 4.84 of the Commission's regulations, which provides (App. A, *infra*, pp. 118–119):

> Applications for amendments of preliminary permits shall follow the form prescribed for original applications, as far as applicable. If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application. * * * [56]

The Supply System's argument fallaciously assumes that this regulation specifies *when* amendments are to be sought, though on its face it merely spells out the procedure to be followed *if* an amendment is requested, as for example when the original term of a permit is sought to be extended or when the permittee seeks to have additional lands withdrawn.[57] As the Commission's opinions explain in some detail (II R. 653–654; 790–792), the suggestion that an amendment

[56] The Act makes no reference to amendments to permits and the Commission's regulations were silent on such amendments until publication of revised regulations in 1937. 2 Fed. Reg. 82, 93.

[57] It should be noted in the latter connection that while nothing in the Act or the regulations thereunder requires a permittee to seek additional withdrawals if the tentative project boundaries are modified, he may wish to do so for his own protection.

is required whenever a permittee concludes that the project for which it will seek a license differs in any respect geographically from that described in the permit would afford a permittee "no flexibility to develop the best project on the reach involved" (II R. 790). For the Supply System's position is that any change in site or area not only necessitates an amendment but, much more significantly, allows public agencies to assert their preference at that point. Such a position obviously would deter a permittee from changing its plans to advance a better proposal uncovered in the course of his studies.

By contrast, the Commission's view—that an amendment is not required so long as the permittee's plans, as modified, relate to a project in the same reach of the river as the project described in the permit—avoids those difficulties. It encourages the permittee to explore all alternative sites and thus comports with the basic objective of Section 10(a)—*i.e.*, comprehensive development of the affected water resources. In addition, it precludes the issuance of successive permits relating to slightly different projects in the same reach of a river, a practice which, if followed, would derogate from the statutory policy of Section 5 limiting the life of a permit to a maximum period of three years (see II R. 643–644).

Finally, the Commission's reasoning here is fully consistent with its action in *Montana Power Co.*, 17 FPC 834 (1957), a case involving one of Pacific Northwest's organizing companies (with which the company was of course familiar when it had a similar problem

a year later). The Commission there (17 FPC at 835) denied a permit for a project which "if constructed would develop the same reach of river as would the proposed projects described in Applicant's [existing] preliminary permits. * * *" It concluded that such additional studies as were required in connection with the proposed new project could be made under the outstanding preliminary permits and that it was thus unnecessary to grant Montana Power's request for a permit for a different site in the same reach of the river covered by existing permits. In so acting, it was well aware "that development of the entire reach of the river by [the newly proposed project] would flood a much larger area than [the alternative projects] and would involve substantially different local considerations." 17 FPC at 834.[58] As the Commission

[58] In its application for rehearing to the Commission and in its initial brief in the court below, the Supply System attacked the Commission's reliance on *Montana Power*, claiming that that decision represented "an aberration from normal Commission practice" (brief for petitioner, C.A.D.C. No. 18728, p. 21). The cases heretofore relied upon by the Supply System as illustrating what it then regarded as normal Commission practice are *Appalachian Electric Power Co.*, 17 FPC 8, and 19 FPC 169; *Northern Lights, Inc.*, 17 FPC 257, and 19 FPC 91; and *Montana Power Co.*, 13 FPC 980, 14 FPC 587, and 14 FPC 590. In *Appalachian* and *Northern Lights*, the Commission granted amendments enlarging the scope of the outstanding permits, but in each of those cases amendment was occasioned by the fact that the applicant had proposed to investigate a second project in an entirely new reach of the river.

In the *Montana Power* case relied upon by the Supply System, the company had obtained a permit for a project on the Flathead River at river mile 68.6. It decided to add to this a

majority observed (II R. 649–650), the holding in *Montana Power* cannot be reconciled with the view that an amendment is required whenever the tentative project boundaries are enlarged, however slightly.

c. The Supply System's further contention (Br. pp. 48–49) that "[t]he decision below would make a shambles out of all river basin planning by federal and state agencies" because "[c]omprehensive river basin planning necessitates accurate notice of proposed projects to a host of affected federal and state agencies" fails to recognize that all such parties were, in fact, fully advised of the proposed High Mountain Sheep project approximately two years before the hearing thereon by the Commission's noticing of the license application (I R. 238–239). To the extent that these agencies have objections to the proposed project

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new—and again, entirely different and additional—project at river mile 36.4. At the same time, the company concluded that the upstream project should be moved from river mile 68.6 to river mile 60.7. Since the company was already applying for a permit for its entirely new downstream project, it also filed for a permit for the newly located upstream project. Such a permit may not have been necessary (the problem does not appear to have been considered by the Commission) since the new upstream project was in the same reach of the river as its predecessor and thus within the scope of the outstanding permit. However, the grant of an additional permit, where a new and entirely separate project was also involved, hardly validates a claim that the later *Montana Power* case is an aberration. Indeed, the *Montana Power* order relied on by the Supply System is the only case we have found where a second permit (or an amendment) was granted for a project which was known to be mutually exclusive with that described in the already outstanding permit.

relating to any aspect of comprehensive river development in the public interest, notice of the license application and of the hearing thereon is adequate to permit such objections to be voiced. It is for this reason that the Commission notices all license applications—whether preceded by a preliminary permit or not—as a matter of course.[59] And in this case it is significant to note that, with the exception of the Washington Department of Conservation, all of the interested State conservation agencies and numerous private conservation groups that intervened and participated in the hearing actively supported Pacific Northwest's proposal to develop High Mountain Sheep.[60]

In our view, the narrow scope that the Supply System would ascribe to a preliminary permit simply does not accord with the realities of water resource development. Nor is this restrictive scope required by the Act or by the regulations. In these circumstances, this Court should adhere to its customary reluctance

[59] Such notice is regularly published in the Federal Register and local newspapers. In addition, the Commission gives notice to State and federal wildlife authorities in accord with the provisions of Section 2 of the Wildlife Resources Act of 1946. 60 Stat. 1080, as amended, 16 U.S.C. § 662(a). And Section 1.37 of the Commission's Rules of Practice and Procedure calls for notice to State commissions affected by any Commission proceeding. See App. A, *infra*, pp. 113–114.

[60] Eleven such parties have intervened in this Court in support of the Commission's order. The Washington Department of Conservation, which is not participating here, supported the Supply System below.

to upset reasonable administrative action (*United States* v. *Shimer*, 367 U.S. 374, 382):

> * * * whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. [Citing cases.] * * *

See also, *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408; *Securities & Exchange Commission* v. *New England Electric System*, 384 U.S. 176, 185.

B. THE COMMISSION'S REFUSAL TO LICENSE THE MOUNTAIN SHEEP-PLEASANT VALLEY PROPOSAL DID NOT TERMINATE PACIFIC NORTHWEST'S PRELIMINARY PERMIT

There is also no substance to the Supply System's argument (Br. pp. 59–63) that Pacific Northwest's permit was terminated as a result of the Commission's denial, in 1958, of the company's Mountain Sheep-Pleasant Valley license application. In making this argument, the Supply System ignores Section 5 of the Act, the only statutory provision dealing with termination of permits.

Section 5 provides that a preliminary permit may be canceled

> * * * *by order of the Commission* upon failure of permittees to comply with the conditions thereof or for other good cause shown *after notice and opportunity for hearing.* [Emphasis added.]

The statute does not provide any other procedure for terminating permits during their term, and the Supply System does not attempt to show compliance with the foregoing provision in support of its claim of permit termination. Specifically, there is no contention (1) that Pacific Northwest was given notice that its permit was to be canceled; (2) that Pacific Northwest was given an opportunity for hearing on that issue; or even (3) that the Commission has issued an order terminating the permit. Particularly in view of the decision in *Civil Aeronautics Board* v. *Delta Air Lines,* 367 U.S. 316, the claim of permit termination absent compliance with the specific statutory procedure prescribed therefor is clearly without support. Nevertheless, the Supply System makes a two-fold attack on the effectiveness of the permit following the denial of the Mountain Sheep-Pleasant Valley license application.

1. First, it asserts that as a result of that denial the permit was automatically canceled. But the Supply System points to absolutely nothing in either the Act or in its legislative history which suggests that a permittee may not apply for a license—and assert his priority therefor—after denial of a previous license application. Instead, its claim is based entirely upon an opinion rendered by a former General Counsel of the Commission in 1923. But, as the majority of the Commission explained (II R. 650), that opinion dealt with "quite a different question from the one involved here."

The General Counsel was asked in 1923 whether the priority afforded by a permit survives the expiration

of the statutory three-year limitation on the permit itself. See Federal Power Commission, *Third Annual Report,* pp. 222–223 (1923). Specifically, the question was whether, assuming an outstanding three-year permit and a pending license application by the permittee, the Commission must proceed to decision within the three-year period in order to preserve the priority, or whether the filing of the license application within that period preserves the priority until the Commission acts on that application (*Id.* at p. 222). The General Counsel concluded that the filing of the application preserved the priority. As the Commission noted (II R. 788), it followed that interpretation in this case by according Pacific Northwest priority even though the term of the three-year permit expired soon after the filing of the license application acted upon here. This construction is not questioned.

The Supply System, however, would construe the General Counsel's opinion as also deciding a question neither posed nor answered; namely whether a permit of fixed duration is, as a matter of law, terminated by a denial, before the expiration date of the permit, of a related license application. The claim is based on a comment in the General Counsel's 1923 opinion that (see SS Br. p. 61):

> * * * The priority attaches to the application for a license and attends it until the application is withdrawn or is granted or rejected by the Commission.

This language is of no assistance to the Supply System's argument. For, as we have shown, the General Counsel's opinion was given in response to an

inquiry that assumed that the Commission's final action on the license application would occur *after* the expiration date of the permit.[61] On this assumption, priority obviously would exist only until the Commission granted or denied the license. But in the instant case, the Commission's denial of the Mountain Sheep-Pleasant Valley license application came well *before* the expiration date of Pacific Northwest's permit, a circumstance obviously not discussed by the General Counsel.

The reference (SS Br. p. 62, n. 1) to the Commission's statements in its *Thirteenth and Fourteenth Annual Reports* (1933 and 1934) that several permits were terminated because of the denial of applications for license does not support the implied claim that the Commission has previously followed the Supply System's interpretation of the 1923 General Counsel's opinion. An examination of these annual reports shows that in each case where a preliminary permit was canceled after denial of a license application, the permit, unlike Pacific Northwest's, had been issued

[61] The Supply System points out that the General Counsel's opinion resulted from an inquiry presented with respect to a permit and license application of James B. Girand. Examination of the *Girand* case demonstrates the invadidity of any reliance on that opinion for the purpose sought by the Supply System. For in *Girand* the sole issue was whether, in order to preserve the applicant's priority, it was necessary to extend the expiration date of his preliminary permit even though a license application had been filed prior to that date. The General Counsel concluded that such an extension was unnecessary. See Federal Power Commission, *Third Annual Report*, p. 132 (1923).

more than three years prior to the license denial and had thus expired pursuant to the three year maximum life provision of Section 5 of the Act.[62]

2. The Supply System also contends (Br. pp. 62–63) that the Commission's decision denying the requested license for the Mountain Sheep-Pleasant Valley proposal implied a cancellation of the preliminary permit because it stated that "any combination of projects which include Nez Perce is consistently superior to any combination of projects which does not include Nez Perce." There is no merit in this contention.

The Supply System argument seems to be that this Commission's statement in the licensing case constituted a rejection of a dam at High Mountain Sheep

[62] The cases upon which petitioner presumably seeks to rely are as follows: *James B. Girand*, Project No. 121, permit issued July 19, 1921, license denied June 26, 1933, Federal Power Commission, *Thirteenth Annual Report* 227; *Gauley Power Co.*, Project No. 497, permit issued April 7, 1925, Federal Power Commission, *Fifth Annual Report* 173, license denied January 12, 1933, Federal Power Commission, *Thirteenth Annual Report* 128; *George T. Cameron*, Project No. 755, permit issued June 16, 1927, Federal Power Commission, *Seventh Annual Report* 219, license denied March 20, 1933, Federal Power Commission, *Thirteenth Annual Report* 172; *I. Zellerbach and J. D. Zellerbach*, Project No. 758, permit issued June 16, 1927, Federal Power Commission, *Seventh Annual Report* 219, license denied March 20, 1933, Federal Power Commission, *Thirteenth Annual Report* 173; *Western Washington Electric Light & Power Company*, Project No. 835, permit issued April 6, 1928, Federal Power Commission, *Eighth Annual Report* 184, license denied October 6, 1933, Federal Power Commission, *Fourteenth Annual Report* 102.

and that in some way Pacific Northwest's failure to seek review of that decision resulted in a cancellation of the permit. But any effort at review would have had to be aimed at showing that the Commission had erred in not issuing a license for the Mountain Sheep-Pleasant Valley dams. Construction of a High Mountain Sheep project had not then been proposed by the applicant nor had it been considered by the Comission in the comparison of different plans of development.[63] Accordingly, as it might have applied to High Mountain Sheep the Commission's statement upon which the Supply System now relies was at most *dictum*. While Pacific Northwest might have sought review of the denial of its license for Mountain Sheep-Pleasant Valley there would have been no basis for challenging *dictum* as to High Mountain Sheep which was unrelated to Pacific Northwest's license application. We repeat, that under the express terms of the Act a permit can be terminated prior to the expiration of the term for which it was granted only by order of the Commission, after notice and opportunity for hearing. See, *supra*, p. 98. The statement in the

[63] As the 1958 opinion shows, the Nez Perce plan was considered superior because of greater storage which would provide almost twice as much flood control as plans of which Mountain Sheep-Pleasant Valley was a part and also more prime energy (II R. 841–846). By contrast, as the present case showed, the plan of development including High Mountain Sheep provides somewhat greater storage than the Nez Perce plan.

Commission's 1958 opinion plainly did not purport to constitute such a termination.

C. THE COMMISSION REASONABLY CONCLUDED THAT PACIFIC NORTHWEST'S APPLICATION FOR HIGH MOUNTAIN SHEEP WAS FILED ON MARCH 31, 1958, IN FULL COMPLIANCE WITH THE ACT AND THE RULES AND REGULATIONS THEREUNDER

The Supply System also contends (Br. pp. 63–65) that Pacific Northwest's license application was not properly filed within the three-year term of the permit and that accordingly the priority afforded by the permit was lost. The basis for this claim is that after the three years had expired, the Commission requested, and Pacific Northwest filed, additional data in support of its pending High Mountain Sheep application. The Supply System suggests that the necessity for securing the additional data destroys the effectiveness and timeliness of the original license application. The Commission's regulations negate this view and show that, to the contrary, all information that might be required before issuance of a license is not required to accompany the license application.

Section 4.31 of the regulations (App. A, *infra*, pp. 115–116) deals with acceptance and rejection of license applications and provides that "[a]n application which fails to meet [certain prescribed] requirements will be rejected by the Secretary * * *." Section 4.31 further provides that certain data, which must ultimately be filed as a part of the application, need not be filed until "such time as the Secretary directs," and that

failure to furnish such additional data at *that* subsequent date "will constitute grounds for rejection of the application by the Secretary * * *."[44] The regulation thus clearly indicates that the Commission may require additional information from the applicant during the processing of the original application, without casting any doubt on the adequacy of the original filing.

The exercise of that prerogative here surely does not connote any impropriety with respect to the acceptance of Pacific Northwest's license application. Indeed, the Secretary's letter of April 23, 1958, requesting additional information (II R. 712; SS Br. pp. 57–58), refers to four exhibits (H, I, L, and N), three of which (H, I, and N) expressly need not be filed with the original application. And even exhibit L, calling for design drawings, the item upon which the Supply System primarily relies for its argument that the application was so incomplete as to constitute no application (SS Br. pp. 56–57), does not have to be filed in final form at the time of the original application. Section 4.31 of the regulations expressly provides that an acceptable application may include as

[44] Sections 4.40 and 4.41 of the Regulations prescribe the required contents of a license application. These included eleven items of information ((a) through (k)) and exhibits A through O. Section 4.31 provides that: "* * * An application may be acceptable for filing for processing prior to final Commission action thereon, provided it contains the information required under § 4.40 (a), (b), (c), (d), (e), (f), and (h), together with Exhibits A, B, E, G, J, K, L, M, O * * * required under § 4.41. * * *" The remaining data is required to be filed "at such time as the Secretary directs." See, App. A, *infra*, p. 115.

Exhibit L "the *tentative* design of the project works proposed" (emphasis added). Nine tentative design drawings of the present High Mountain Sheep project were submitted by Pacific Northwest with its original application (see I R. 192–200).[65] Seven of the nine tentative drawings were later replaced by amended drawings (see I R. 226–233), a fact which the Supply System regards as conclusive proof of a fatal infirmity in the original application. But it overlooks the fact that an amendment of the Exhibit L drawings not only is clearly anticipated by the regulations but is also the normal occurrence in licensing proceedings.[66]

The Supply System's related contention that the priority was lost because of Pacific Northwest's failure to complete all the requisite investigations relating to High Mountain Sheep prior to March 31, 1958, is also without substance. Significantly, both Articles 1 and 7 of the permit (I R. 159–161, 164) show that the studies required to be completed within the term of a permit are those which will enable the permittee to file a license application consistent with the "Commission's rules and regulations." As we have discussed, *supra,* the Commission reasonably concluded that Pacific Northwest had met that requirement here.

The Supply System refers (Br. pp. 55–56, 58, 64) to two documents filed by Pacific Northwest with the Commission and implies that these contain admis-

[65] In addition, Pacific Northwest submitted other drawings (which it later withdrew, I R. 220) depicting the proposed project works at Mountain Sheep-Pleasant Valley.

[66] For example, the Supply System, at the close of cross-examination, redesigned the dam and powerhouse for its Nez Perce project.

sions by Pacific Northwest that it had not investigated High Mountain Sheep prior to expiration of the permit. The documents do not support this claim.

The first, a letter written on March 11, 1958 (II R. 714–716), simply indicates that Pacific Northwest proposed to study High Mountain Sheep *and* Nez Perce "on a comparative basis" and that such a study would take approximately ten months. The Supply System suggests (Br. pp. 55–56) that because the company was talking in terms of needing ten months to study High Mountain Sheep *and* Nez Perce, it could not possibly have made any investigation before it filed a High Mountain Sheep license application twenty days later. But the Supply System completely overlooks the fact that Pacific Northwest had investigated the present High Mountain Sheep site as early as 1957 (I R. 7, IV R. 138), well within the life of the permit.[67]

Similarly, the Supply System misreads the plain language of the second document, a petition for declaratory order filed by Pacific Northwest (I R. 211–216), by suggesting that Pacific Northwest's acknowledgment that structures below the mouth of the Imnaha were not studied prior to the filing of the Mountain Sheep-Pleasant Valley application (on Sep-

[67] In this connection it may be appropriate to note the following description by the Supply System's managing director of how that agency's Nez Perce application was prepared and filed (IV R. 258): "WPPSS moved swiftly and on March 15 (3 weeks and 2 days after the decision [to file] was made by the Board of Directors) an application to construct the great Nez Perce Project was filed with the Federal Power Commission in Washington, D.C."

tember 7, 1955) should be read as a concession that those structures were therefore not studied at all prior to the March 31, 1958 filing.[68] As we have seen, Pacific Northwest had investigated the High Mountain Sheep site as early as 1957.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted.

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MARCH 1967.

[68] It should be observed that much of the preliminary work undertaken by Pacific Northwest prior to its Mountain Sheep-Pleasant Valley application was relevant and useful in terms of the subsequent High Mountain Sheep application. For example, the utility of stream flow studies, geological tests, marketing forecasts, etc., is not limited by reference to any single precise project site.

We suggest, however, that the exact amount of such work has no independent significance with regard to compliance with the terms and conditions of the permit in view of the fact that the license application filed by Pacific Northwest before the expiration of the permit for that project was in full compliance with the applicable rules and regulations.

*The filing of this brief has been authorized by the Solicitor General.

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